

**Joint Legislative Committee on Performance  
Evaluation and Expenditure Review (PEER)**

Report to  
the Mississippi Legislature



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# **Mississippi State University's Acquisition of Selected Construction Contracts, FY 2006 to Present**

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Managers at Mississippi's universities face numerous challenges in planning and implementing campus construction work. Universities must consider funding and accompanying timelines, as well as the campus environment in relation to the academic calendar. Universities must also comply with state purchasing laws and policies of the Board of Trustees of State Institutions of Higher Learning regarding acquisition of construction services.

In FY 2006, managers from the Mississippi State University (MSU) Department of Facilities Management and the Office of Procurement and Contracts began using alternative methods to accomplish several small-scale construction efforts on campus. This was in response to the managers' belief that the state's bid laws inhibited the university's attempts to meet its construction needs in a timely manner. Subsequently, local construction contractors and some legislators questioned the legality and fairness of these methods and requested that PEER conduct this review.

PEER found that some of MSU's methods of acquiring construction services for small-scale projects from FY 2006 to FY 2008 did not comply with state law or circumvented state law. In FY 2008, managers began using term contracts for small-scale construction projects. These term contracts complied with state law, but were flawed in that they did not allow determination of the lowest and best bidder and subjected the university to potential difficulties in controlling costs. By August 2008, MSU managers had ceased using term contracts and were using competitive methods of acquiring construction services that ensured that contracts were awarded to the lowest and best bidder.

The report provides recommendations for ways to reduce the restrictions on university procurement practices for construction services, yet also maintain a fair and competitive environment in which contractors may compete for university construction projects.

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June 9, 2009

Honorable Haley Barbour, Governor  
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Honorable Billy McCoy, Speaker of the House  
Members of the Mississippi State Legislature

On June 9, 2009, the PEER Committee authorized release of the report entitled **Mississippi State University's Acquisition of Selected Construction Contracts, FY 2006 to Present.**

A handwritten signature in cursive script that reads "Harvey Moss". The signature is written in black ink and is positioned above a horizontal line.

Representative Harvey Moss, Chair

**This report does not recommend increased funding or additional staff.**



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# Mississippi State University's Acquisition of Selected Construction Contracts, FY 2006 to Present

## Executive Summary

### Introduction

In response to citizens' complaints, PEER reviewed Mississippi State University's acquisition of selected construction contracts to determine whether the university complied with applicable state law and policies of the Board of Trustees of State Institutions of Higher Learning.

### Problem Statement

Managers at Mississippi's universities face numerous challenges in planning and implementing campus construction work. Universities must consider funding and accompanying timelines (i. e., the window of opportunity in which managers learn the amount of funding that may be used and whether the work can be completed within the timeframe in which the funding must be spent), as well as the campus environment in relation to the academic calendar. Universities must also comply with state purchasing laws and policies of the Board of Trustees of State Institutions of Higher Learning regarding acquisition of construction services.

In FY 2006, managers from the Mississippi State University (MSU) Department of Facilities Management and the Office of Procurement and Contracts began using alternative methods described within this report to accomplish several small-scale construction efforts. This was in response to the managers' belief that the state's bid laws inhibited the university's attempts to meet its construction needs in a timely manner.

Subsequently, local construction contractors and some legislators questioned the legality and fairness of these methods (i. e., whether construction work was properly advertised, whether contracts were awarded to the lowest and best bidders, whether certain types of contracts for construction were legal, and whether MSU managers "split" the bids in order to circumvent state law) and requested that PEER conduct this review.

## Entities Responsible for University Construction Work

Managers at three possible levels may be involved in construction work at the university campuses: at the IHL Executive Office, at the Department of Finance and Administration, and at the university level. The involvement of the first two entities is determined by the estimated cost of the construction work and the source of funds to pay for the work.

IHL Policy 902 requires that the IHL Board approve construction of new facilities, repairs, and renovations to existing facilities, and requests for a capital outlay with a total budget of \$250,000 or more, regardless of how these projects are financed. According to David Anderson, Deputy Executive Director of the Department of Finance and Administration, if work is to be paid for with general fund appropriations or state bonds, the Department of Finance and Administration's Bureau of Building must approve a university construction project. If work is to be paid for with self-generated funds, the project does not have to be approved by the Bureau of Building.

At the university level, the MSU Department of Facilities Management is responsible for managing, designing, planning, and overseeing construction, repair, and maintenance services. The MSU Office of Procurement and Contracts is responsible for contracting for and purchasing the labor, equipment, and materials needed for construction, repair, and maintenance services.

### Questions and Answers Regarding MSU's Acquisition of Selected Construction Contracts

**Did Mississippi State University comply with requirements of state law regarding the purchase of construction in FY 2006 through FY 2008?**

*From FY 2006 through FY 2008, managers at the MSU Department of Facilities Management and the Office of Procurement and Contracts utilized some methods of acquiring construction services for small-scale projects that did not comply with state law or that circumvented state law.*

MISS. CODE ANN. Section 31-7-13 (a) through (c) (1972) requires that purchases (including construction) of over \$5,000 be made from the lowest and best bidder, determined through solicitation of competitive written bids.

However, to expedite and accomplish as much construction work as possible during the summer months, in FY 2006 through FY 2008 managers at the MSU Department of Facilities Management and the Office of Procurement and Contracts utilized some methods of acquiring construction services that did not include a truly competitive selection process for contractors:

- In FY 2006 and FY 2007, MSU issued no-bid labor/equipment-only purchase orders that separated the cost of labor and equipment from the cost of materials necessary to complete the construction project, thus splitting the construction project and subsequently circumventing the bid laws.
- In FY 2007, MSU managers divided the cost of construction work for the Morrill Road area into three purchase orders, each of which was for an amount less than the cost threshold that would have necessitated soliciting competitive bids.
- In FY 2008, MSU issued a purchase order for a specialized type of construction for a specified period. The purchase order required submission of daily invoices, each for an amount less than the cost threshold that would have necessitated soliciting competitive bids.

Although MSU might have had a legitimate need to expedite the acquisition process for small-scale construction projects, MISS. CODE ANN. Section 31-7-13 (o) (1972) prohibits the splitting of construction projects to circumvent the state's bid laws. This situation is exacerbated by the fact that the state's bid laws do not define what constitutes a "construction project."

After analyzing MSU's use of the three above-described methods for procuring construction contracts, PEER concluded that because MSU circumvented state bid laws, the university's managers could not demonstrate that they had attempted to obtain the best price for construction services. Also, MSU's actions restricted the opportunity for contractors to compete for construction projects.

**What actions did MSU managers take after determining that the university's acquisition of some construction work did not comply with state law?**

***Managers of the MSU Department of Facilities Management and the Office of Procurement and Contracts began using term contracts in FY 2008 for small-scale construction projects. These term contracts complied with state law, but were flawed in that they did not allow determination of the lowest and best bidder and subjected the university to potential difficulties in controlling costs. By August***

***2008, MSU managers had ceased using term contracts and were using competitive methods of acquiring construction services that ensured that contracts were awarded to the lowest and best bidder.***

Because IHL Policy 707.01 limits the board's oversight to service contracts estimated to cost \$250,000 or more and the term contract for Request for Proposals 07-52 was an indefinite quantities service contract for construction with no defined cost, MSU managers did not submit the contract to IHL for review, despite total costs of over \$1.6 million.

In response to contractors' complaints, in July 2008 MSU conducted an internal audit of construction procurement and instituted corrective action. By August 2008, MSU had ceased the use of term contracts (see page 21 regarding term contracts being legal and competitive) and was using competitive methods of acquiring construction services that ensured that contracts were awarded to the lowest and best bidder.

## Recommendations

PEER recognizes that some of the purchasing restrictions imposed by state law inhibit the universities' ability to expedite small-scale construction projects within the time frames related to funding and the academic calendar. In order to meet the university's construction needs within the desired time frames, from FY 2006 through FY 2008 MSU utilized methods of acquiring construction services that did not comply with or circumvented state law. In many cases, use of these procurement methods damaged the university's relationships with construction contractors.

The Legislature must balance the universities' small-scale construction needs and time frames with the need to maintain a fair and competitive environment for procuring university construction services at the lowest and best price, maximizing the yield from public funds.

Also, the Board of Trustees of State Institutions of Higher Learning should strengthen its policies regarding university construction projects. At present, even though term contracts for university construction could potentially cost more than the threshold amount requiring IHL approval, these contracts could escape IHL oversight.

PEER provides the following recommendations for ways to reduce the restrictions on university procurement practices for construction services, yet also maintain a fair

and competitive environment in which contractors could compete for university construction projects.

1. The Legislature should amend MISS. CODE ANN. §31-7-1 (1972) to include the following definition of a “construction project:”

*“Construction project” shall mean a project including planning, design, preparation, and performance of a new capital improvement, alteration, conversion, fitting out, commissioning, major renovation or repair, demolition or decommissioning of any structure or infrastructure. The project scope shall be inclusive of scope of work, timeline and budget. The term “construction project” shall also include any or all necessary materials, labor, and equipment, needed to complete the project if such are contracted for separately.*

Such statutory definition would specifically require that an entity consider all related costs of construction efforts together as a construction project. Thus the entity would be required to compare aggregate costs of the effort to the cost thresholds specified in CODE Section 31-7-13 to determine which competitive procurement method should be utilized.

2. The Legislature should amend MISS. CODE ANN. Section 31-7-13 (n) (1972) to establish parameters for term contracts. The amendment should address the following:
  - define “term contract” and “indefinite delivery, indefinite quantities contract;”
  - separate the requirements and restrictions for indefinite delivery, indefinite quantities contracts for public construction from those of term contracts for commodities and equipment;
  - require the Department of Finance and Administration to approve indefinite delivery, indefinite quantities contracts for public construction (i. e., in order to use indefinite delivery, indefinite quantities contracts, universities would be required to submit to the Department of Finance and Administration’s oversight of term contracts) and to adopt regulations necessary to administer them;

- prohibit hourly rate indefinite delivery, indefinite quantities contracts for state entities, except when specifically approved by the Department of Finance and Administration (DFA). Local governing authorities (e. g., cities, school districts, community colleges), however, would not be allowed to use hourly rate contracts for any reason;
- limit the time frame of indefinite delivery, indefinite quantities contracts to one base year and limit the maximum number of option years to three;
- impose a maximum cost limit of \$3 million per year on term contracts for public construction and a maximum cost per construction project of \$500,000; and,
- require vendors seeking indefinite delivery, indefinite quantities contracts for public construction to hold a current certificate of responsibility from the Board of Public Contractors for any term contract unless the term contract explicitly prohibits projects that exceed \$50,000.

See the report's Appendix, page 33, for a proposed draft amendment to CODE Section 31-7-13 (n) (1972).

If state law were thus amended, it would provide an option for universities, as well as other public entities, to procure construction services more efficiently. Thus if the need arose and funding were available, a public entity could move quickly to the construction phase without having to develop detailed specifications and solicit bids for each individual small-scale construction project.

3. In the event that the Legislature adopts the bill proposed on page 33, the board should adopt the same threshold for approval for indefinite delivery, indefinite quantities contracts that DFA adopts in its rules and regulations. If the proposed legislation is not adopted, the Board of Trustees of State Institutions of Higher Learning should approve all term contracts that have no set maximum price.
4. Mississippi State University should ensure that personnel of the Department of Facilities Management and the Office of Procurement and Contracts, as well as the university's construction contractors, understand the requirement of laws, policies, and procedures concerning the procurement of construction services.

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# Mississippi State University's Acquisition of Selected Construction Contracts, FY 2006 to Present

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## Introduction

### Authority

In response to citizens' complaints, PEER reviewed Mississippi State University's acquisition of selected construction contracts to determine whether the university complied with applicable state law and policies of the Board of Trustees of State Institutions of Higher Learning.

PEER conducted the review pursuant to the authority granted by MISS. CODE ANN. Section 5-3-57 et seq. (1972).

### Problem Statement

Managers at Mississippi's universities face numerous challenges in planning and implementing campus construction work. Universities must consider funding and accompanying timelines (i. e., the window of opportunity in which managers learn the amount of funding that may be used and whether the work can be completed within the timeframe in which the funding must be spent), as well as the campus environment in relation to the academic calendar. Universities must also comply with state purchasing laws and policies of the Board of Trustees of State Institutions of Higher Learning regarding acquisition of construction services.

In FY 2006, managers from the Mississippi State University (MSU) Department of Facilities Management and the Office of Procurement and Contracts began using alternative methods described within this report to accomplish several small-scale construction efforts. This was in response to the managers' belief that the state's bid laws inhibited the university's attempts to meet its construction needs in a timely manner.

Subsequently, in 2008, local construction contractors and some legislators questioned the legality and fairness of these methods (i. e., whether construction work was properly advertised, whether contracts were awarded to the lowest and best bidders, whether certain types of contracts for construction were legal, and whether MSU managers “split” the bids in order to circumvent state law) and requested that PEER conduct this review.

## Scope and Purpose

In reviewing these complaints, PEER sought to answer the following question:

- Did Mississippi State University comply with requirements of state law regarding the purchase of construction in FY 2006 through FY 2008?

After determining that the university’s acquisition of some construction work did not comply with the bid requirements of state law, PEER also sought to determine:

- What actions did MSU managers take after determining that the university’s acquisition of some construction work did not comply with state law?

In answering these questions, PEER limited its review to small-scale construction efforts--primarily, construction work cited by the complainants (e. g., work in the Morrill Road area) or that procured through labor/equipment-only service contracts. PEER’s review did not include large-scale capital improvement projects undertaken by Mississippi State University during this period.

After answering these questions, PEER made recommendations to improve the process for acquiring construction services at the state’s universities.

## Method

In conducting this review, PEER:

- analyzed state laws, regulations, and IHL policies regarding public universities’ bidding of public construction and labor-only service contracts;
- reviewed records documenting MSU managers’ procurement of labor, equipment, and materials for

public construction (including repair and maintenance) between FY 2006 and the present;

- interviewed MSU staff responsible for implementing, overseeing, or auditing public construction work; employees of five of the complainant construction companies; staff of the Office of the State Auditor, the Department of Finance and Administration, and the Board of Public Contractors; representatives of the Gordion Group and the Center for Job Order Contracting Excellence; and staff of the New York Office of General Services and the Washington State Department of General Administration; and,
- reviewed reports of the State Auditor, the MSU Internal Auditor, and the State Board of Public Contractors, as well as procurement documents associated with MSU construction.

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# Chapter 1: How the Universities Plan and Implement Construction Work

Managers at three possible levels may be involved in construction work at the university campuses: at the IHL Executive Office, at the Department of Finance and Administration's Bureau of Building, and at the university level. The involvement of the first two entities is determined by the estimated cost of the construction work and the source of funds to pay for the work.

## Entities Responsible for University Construction Work

### Role of IHL in University Construction Work

**The anticipated cost of a campus construction project determines whether IHL plays a role in its approval.**

If a university's construction work is anticipated to cost \$250,000 or more, IHL must approve the construction project. IHL Policy 902 requires that the IHL Board approve construction of new facilities, repairs and renovations to existing facilities, and requests for capital outlay with a total budget of \$250,000 or more, regardless of how these projects are financed. This policy states that all construction, repairs, and renovation projects with a budget under \$250,000 "may be approved by the Institutional Executive Officer," which in MSU's case would be the president of the university.

### Role of the Bureau of Building in University Construction Work

**The source of funds determines whether the Department of Finance and Administration's Bureau of Building plays a role in approval of university construction work.**

**University construction projects that are paid for with self-generated funds do not have to be approved by the Bureau of Building.**

According to David Anderson, Deputy Executive Director of the Department of Finance and Administration (DFA), if work is to be paid for with general fund appropriations or state bonds, DFA's Bureau of Building must approve a university construction project. If work is to be paid for with self-generated funds, the project does not have to be approved by the Bureau of Building.

## MSU Offices Responsible for University Construction Work

The MSU Department of Facilities Management is responsible for managing, designing, planning, and overseeing construction, repair, and maintenance services. The MSU Office of Procurement and Contracts is responsible for contracting for and purchasing the labor, equipment, and materials needed for construction, repair, and maintenance services.

Two offices are directly responsible for overseeing and procuring construction at MSU: the Department of Facilities Management and the Office of Procurement and Contracts. Both offices report to the Office of the Vice President for Finance and Administration.

The Department of Facilities Management is responsible for utilities services, facilities services, landscape and grounds services, custodial services, and planning and construction services, and includes the MSU Safety Officer. Two specific areas within the Department of Facilities Management are responsible for construction, maintenance, repair, and/or renovation:

- **Project Management Team.** The project management team under Facilities Services is responsible for projects defined as construction, maintenance, repair, renovation, or equipment installation. The team also develops contract specifications and plans, purchase orders, or in-house plans for funding, procurement, and execution. The team also coordinates with Facilities Management for scheduling of personnel to accomplish in-house projects and manage contractor-provided services from concept through completion.
- **Planning and Construction Services.** Planning and Construction Services is responsible for the full range of facilities planning services from the concept of a new requirement to the planning of the demolition of unneeded facilities, including design and construction administration and management. Planning and Construction Services is also responsible for coordinating and managing the plans, designs, estimates, specifications, and procurement actions for capital improvement projects under the authority of external agents such as the Board of Trustees of State Institutions of Higher Learning and the Department of Finance and Administration's Bureau of Building.

The Office of Procurement and Contracts is the purchasing agency of the university. That office has the sole authority

to order supplies, materials, and equipment, and to obligate the university for contractual services, including construction.

## Factors Affecting University Construction Work

**The university's planning process for construction work must be responsive to funding timelines as well as to concerns related to the academic calendar—e. g., disruption of traffic flow or disturbing the learning environment.**

As noted on page 1, managers at Mississippi's universities face numerous challenges in planning and implementing campus construction work. Universities must consider:

- the sources and availability of funds, with accompanying timelines;
- the campus environment in relation to the academic calendar; and,
- IHL policies and state law regarding how universities must acquire construction services.

Following is a description of the first two factors. Page 4 and pages 9-10 address IHL policies and state law regarding how universities must acquire construction services.

For MSU, the sources of funds and funding timelines for construction work may be described as follows in this section. Dates used are based on a hypothetical example of how MSU managers would plan for construction work conducted during FY 2011.

1. In December 2009, MSU's Department of Facilities Management would begin to meet to plan construction work that would need to be completed during the upcoming summer months.

Funding for campus construction work could come from the following sources:

- *The FY 2011 Budget Appropriation.* This funding typically would be determined in March or April 2010 and would be used to fund university construction work completed between July 2010 and June 2011.
- *Self-Generated Funds for FY 2011.* Universities' self-generated funds come from sales and fees from dining services, parking, and the campus

bookstore.<sup>1</sup> Such funds could be spent to pay for university construction work between July 2010 and June 2011. The university might wait until near the fourth quarter of the fiscal year (i. e., April through June) in order to monitor the amount of self-generated funds that might be available to pay for construction needs.

- *Bonds for Line Item Repair and Renovation.* Bonds for such would typically be authorized by the Legislature in March or April 2010 and would be allocated by the Legislature either for specific repair and renovation line items or for general repair and renovation. The Bond Commission would determine when the bonds could be sold (typically between July and September). Once sold, the Bureau of Building typically must authorize release of the funds to the university. The universities typically receive the funding in October but it could be over a year later if the Bond Commission chooses not to sell the bonds. Bond funds for line item repair and renovation may come in phases.
  - *Education Building Corporation Bonds.* These bonds are issued by the individual building corporations of each of the state's public universities. The Education Building Corporation enables the university to finance a construction project through the sale of tax-exempt bonds for renovation or new construction and, in some cases, buy furniture for the new building. MSU typically uses such bonds to build projects that have a revenue stream, such as a dormitory.
2. Based on the level of funding and the funding timeline, the university's Department of Facilities Management determines what work to complete and in what order. The department might have to divide the work into phases in order to complete it within the time constraints a university faces in relation to the academic calendar, such as:
- *Pedestrian and vehicular traffic patterns.* Due to high traffic and pedestrian volume, MSU is limited as to when it can close roads or block off pathways. As a result, the university would prefer to do road and pathway work during the summer.
  - *Class schedules.* The university would prefer not to close classrooms or perform noisy construction

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<sup>1</sup> Tuition is a major source of self-generated funds for universities, but according to MSU's Director of Facilities Management, MSU does not spend tuition funds to pay for construction.

work near classrooms during class hours, as it could inhibit the learning environment.

3. MSU's Vice President of Finance and Administration must approve and allocate funding for construction work before MSU managers begin the process of soliciting bids.

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## Chapter 2: Did Mississippi State University comply with requirements of state law regarding the purchase of construction in FY 2006 through FY 2008?

From FY 2006 through FY 2008, managers at the MSU Department of Facilities Management and the Office of Procurement and Contracts utilized some methods of acquiring construction services for small-scale projects that did not comply with state law or that circumvented state law.

To obtain the answer to this question, PEER sought the answers to several related, more specific questions:

- What does state law require regarding the purchase of public construction?
- What methods did MSU managers use to procure construction work in FY 2006 through FY 2008?
- What problems existed with these methods?

The following sections address each of these questions.

### What does state law require regarding the purchase of public construction?

*State law requires that purchases (including construction) of over \$5,000 be made from the lowest and best bidder, determined through solicitation of competitive written bids. State law prohibits “bid splitting” to avoid the competitive selection process.*

#### Requirements for Competitive Selection of Vendors

MISS. CODE ANN. Section 31-7-13 (a) through (c) (1972) requires that all agencies and governing authorities purchase construction contracts<sup>2</sup> by following these guidelines:

- Purchases of **\$5,000 or less** may be made without advertising or otherwise requesting competitive bids.

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<sup>2</sup> Bidding requirements of MISS. CODE ANN. Section 31-7-13 (1972) also apply to agencies' and governing authorities' purchases of commodities and printing and contracts for garbage collection or disposal, solid waste collection or disposal, sewage collection or disposal, and rentals.

- Purchases of **over \$5,000 but not over \$25,000** may be made from the lowest and best bidder without publishing or posting advertisement for bids, provided at least two competitive written bids have been obtained.
- Purchases of **over \$25,000** may be made from the lowest and best bidder after advertising for competitive bids once each week for two consecutive weeks in a regular newspaper published in the county or municipality in which such agency or governing authority is located.<sup>3</sup>

**Any purchase of \$5,000 or more must be made through a procurement process that gives at least two vendors the opportunity to compete.**

Thus any purchase of more than \$5,000 must be made through a procurement process that gives at least two vendors the opportunity to compete for the chance of offering the lowest and best bid for providing the product or service.

### **Prohibition Against “Bid-Splitting”**

MISS. CODE ANN. Section 31-7-13 (o) (1972) prohibits the circumventing of provisions requiring competitive bids through what is commonly known as “bid-splitting:”

*No contract or purchase as herein authorized shall be made for the purpose of circumventing the provisions of this section requiring competitive bids, nor shall it be lawful for any person or concern to submit individual invoices for amounts within those authorized for a contract or purchase where the actual value of the contract or commodity purchased exceeds the authorized amount and the invoices therefor are split so as to appear to be authorized as purchases for which competitive bids are not required.*

Thus agencies and governing authorities are not to submit multiple invoices for related expenditures so as to “split” the aggregated amount and avoid bid requirements.

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<sup>3</sup> Senate Bill 2923, 2009 Regular Session, was signed into law by the Governor subsequent to the field work for this report. S. B. 2923 amended MISS. CODE ANN. Section 31-7-13 to increase the threshold for advertising for bids from \$25,000 to \$50,000. State entities are now permitted to make public construction purchases of over \$5,000 but not over \$50,000 from the lowest and best bidder without publishing or posting advertisement for bids, provided at least two competitive written bids have been obtained. State entities are now only required to advertise for competitive bids once each week for two consecutive weeks for public construction purchases over \$50,000.

## What methods did MSU managers use to procure construction work in FY 2006 through FY 2008?

*To expedite and accomplish as much construction work as possible during the summer months, in FY 2006 through FY 2008 managers at the MSU Department of Facilities Management and the Office of Procurement and Contracts utilized some methods of acquiring construction services that did not include a truly competitive selection process for contractors.*

From FY 2006 through June 2008, managers at the MSU Department of Facilities Management and the Office of Procurement and Contracts used the following methods to procure construction services for small-scale projects:

- no-bid labor/equipment-only purchase orders for construction services (FY 2006-FY 2007);
- splitting a project to keep invoice amounts under the threshold that would necessitate soliciting bids (FY 2007); and,
- issuing purchase orders in amounts just under the threshold that would necessitate soliciting bids (FY 2008).

The following sections and Exhibits 1 through 3, pages 13 through 15, describe each of these methods in more detail.

*In FY 2006 and FY 2007, MSU issued no-bid labor/equipment-only purchase orders that separated the cost of labor and equipment from the cost of materials necessary to complete the construction project, thus splitting the construction project and subsequently circumventing the bid laws.*

**During FY 2006 and FY 2007, MSU issued labor/equipment-only purchase orders for construction services for a total of \$3,242,397.**

Beginning in the summer of 2005, MSU began issuing no-bid contracts for labor and equipment used in campus construction work. MSU then issued separate purchase orders to purchase materials used in the construction work. During this period, MSU issued 142 labor/equipment-only purchase orders for construction services for a total of \$3,242,397, as shown in Exhibit 1 on page 13. This amount did not include the cost of the materials that MSU purchased separately for the construction work.

According to the current Director of the Office of Procurement and Contracts and the current Director of

Facilities Management, it was their opinion that the reason the MSU managers engaged in this type of contract was to expedite the construction process between the point at which a need was identified and the point at which construction actually began so that the need could be addressed more quickly and more work could be completed during the summer months and during other periods when the campus was less congested.

*In FY 2007, MSU managers divided the cost of construction work for the Morrill Road area into three purchase orders, each of which was for an amount less than the cost threshold that would have necessitated soliciting competitive bids.*

**In June 2007, MSU conducted construction work in the Morrill Road area under three separate purchase orders totaling \$57,947.**

In June 2007, MSU conducted construction work in the Morrill Road area totaling \$57,947. (See Exhibit 2, page 14.) This work included storm drain boxes, sidewalks, and curb and gutter work.

MSU managers divided the Morrill Road construction work into three parts and solicited bids from two companies for each of the three purchase orders. Gregory Construction Services performed all of the construction work on Morrill Road.

*In FY 2008, MSU issued a purchase order for a specialized type of construction for a specified period. The purchase order required submission of daily invoices, each for an amount less than the cost threshold that would have necessitated soliciting competitive bids.*

**The contractor performed construction on the Memorial Seat Wall in August and September 2007 and submitted daily invoices of less than \$4,450 for a total of \$21,686.**

To construct the Memorial Seat Wall at Zacharias Village (originally known as Northeast Village), MSU issued a purchase order to Gregory Construction Services on July 12, 2007, to “provide specialized concrete work and construction and materials as needed for the Department of Housing Facilities for the period July 1, 2007, through June 30, 2008” (see Exhibit 3, page 15). The MSU Office of Procurement and Contracts issued the purchase order for the Memorial Seat Wall in Zacharias Village for not more than \$4,450 in costs per day (submitted in daily invoices) to Gregory Construction Services without obtaining competitive bids.

Gregory Construction Services performed \$21,686 in construction work between August 13, 2007, and September 22, 2007, to construct the wall. For each day, Gregory submitted a daily tally of hours worked with costs. None of the invoices exceeded \$4,450 on any one day.

**Exhibit 1: Labor/Equipment-Only Purchase Orders for Construction Services, FY 2006-FY 2007**

Method	Examples*	Date Span	Number of Projects	Cost	Number of Bids	Winning Contractor
Purchase orders for labor/equipment-only service contracts		FY 2006-FY 2007	142	\$3,242,397	No bids let; purchase order for labor/equipment use	Multiple Contractors
	<i>Labor and equipment to perform work at Memorial Hall front sidewalk and plaza</i>	<i>Purchase order issued September 14, 2006, not to exceed \$59,300</i>		\$54,130		<i>RAF Construction dba RAFCO</i>
	<i>Sidewalk handicap ramps at Hunter Henry Center, Ruby Hall, Sanderson Center, and Dorman Hall</i>	<i>Purchase order issued October 9, 2006, for \$22,865</i>		\$22,865		<i>RAF Construction dba RAFCO</i>
	<i>Concrete apron and curb on east side of M-Club</i>	<i>Purchase order issued August 10, 2006, not to exceed \$28,780</i>		\$21,767		<i>RAF Construction dba RAFCO</i>

\*These are examples of labor/equipment-only service contracts for construction services during this period.

**Summary:** *The use of these labor/equipment-only service contracts did not comply with state bid laws because they split labor and equipment costs from the cost of materials necessary to complete the construction project, thus circumventing state bid laws.*

SOURCE: PEER analysis of files of the MSU Office of Procurement and Contracts.

**Exhibit 2: Splitting the Morrill Road Project to Keep Invoice Amounts Under the Cost Threshold That Would Necessitate Soliciting Competitive Bids, FY 2007**

Name/Description	Date Span	Cost	Number of Bidding Contractors	Winning Contractor
Storm drain boxes (Morrill Road)	Proposals: 06/08/07  Purchase orders: 06/20/07	\$9,869	Solicited and received two bids	Gregory Construction Services
Sidewalks (Morrill Road)		23,137	Solicited and received two bids	Gregory Construction Services
Curb and gutter (Morrill Road)		24,941	Solicited and received two bids	Gregory Construction Services
		<b>\$57,947</b>  Total cost of related construction		

**Summary:** In June 2007, managers at the MSU Department of Facilities Management and the Office of Procurement and Contracts split the Morrill Road construction project into three separate purchase orders, thus circumventing MISS. CODE ANN. Section 31-7-13 (c) (1972), which requires that all public construction projects over \$25,000 be advertised for bids. MISS. CODE ANN. Section 31-7-13 (o) (1972) prohibits the practice of submitting multiple invoices for related expenditures so as to "split" the aggregate amount and avoid bid requirements.

SOURCE: PEER analysis of MSU purchase orders and the report of the MSU Internal Auditor entitled *Construction Procurement Process Audit* (July 16, 2008).

**Exhibit 3: Issuing Purchase Orders in Amounts Just Under the Cost Threshold That Would Necessitate Soliciting Competitive Bids/Not Bidding a Term Contract, FY 2008**

Name/Description	Date Span	Cost	Number of Bidding Contractors	Winning Contractor
Memorial Seat Wall, Zacharias Village	Purchase order: July 12, 2007  Work was to be completed between July 1, 2007, and June 30, 2008; work began August 13, 2007 and was completed September 22, 2007	Costs "not to exceed \$4,450 on any one day," submitted in daily invoices	Neither the individual project nor the term contract under which the project was conducted was let for bids	Gregory Construction Services
		\$21,686  Total cost of related construction		

**Summary:** *Managers at the MSU Department of Housing Facilities and the Office of Procurement and Contracts divided the work for the Memorial Seat Wall construction into purchase orders not exceeding \$4,450 per day, thus circumventing MISS. CODE ANN. Section 31-7-13 (a). That CODE section requires soliciting at least two bids for all public construction projects with an estimated cost of over \$5,000 but not over \$25,000. However, the Memorial Seat Wall construction was actually procured under a term contract that covered the period July 1, 2007, through June 30, 2008, and the term contract was never let for bids.*

SOURCE: PEER analysis of MSU purchase orders and the report of the MSU Internal Auditor entitled *Construction Procurement Process Audit* (July 16, 2008).

## What problems existed with these methods?

*Although MSU might have had a legitimate need to expedite the acquisition process for small-scale construction projects, MISS. CODE ANN. Section 31-7-13 (o) (1972) prohibits the splitting of construction projects to circumvent the state's bid laws. This situation is exacerbated by the fact that the state's bid laws do not define what constitutes a "construction project."*

### Noncompliance with Bid Requirements of State Law

*MSU'S labor/equipment-only service contracts for construction work (FY 2006-FY 2007) did not comply with state law because they split the cost of labor and equipment from the cost of materials necessary to complete the construction project.*

**PEER believes that "construction" in its entirety involves "the process of building, altering, improving, renovating or demolishing" and this process must of necessity involve materials, as well as labor and equipment.**

As noted previously, in FY 2006 and FY 2007, in order to expedite the construction process, MSU issued labor and equipment contracts for various improvements on the Starkville campus, with the university providing the materials. MSU managers believed that this was a viable alternative to the competitive procurement process outlined in state law.

According to the Director of the Office of Procurement and Contracts, prior to his arrival at MSU, MSU managers believed the university was within the law by using this type of contract because MISS. CODE ANN. Section 31-7-13 (1972) does not require bids for labor and equipment contracts, but does for "public construction" (see page 10). However, PEER notes that MISS. CODE ANN. Section 31-7-1 (g) (1972) defines "construction" as:

*. . .the process of building, altering, improving, renovating or demolishing a public structure, public building, or other public real property. It does not include routine operation, routine repair or regularly scheduled maintenance of existing public structures, public buildings or other public real property.*

Thus "construction" in its entirety involves "the process of building, altering, improving, renovating or demolishing" and this process must of necessity involve materials, as well as labor and equipment.

The state's bid laws address the entirety of construction costs and separating materials costs from labor and equipment costs to avoid the state's bid laws is, in essence, "splitting" the costs of a public construction

project. As noted on page 10, this is specifically prohibited by MISS. CODE ANN. Section 31-7-13 (o) (1972).

*MSU managers split Morrill Road construction work (FY 2007) to keep invoice amounts under the threshold amount that would necessitate letting the project for bids, thus "splitting the bids," a practice prohibited by state law.*

Although each of the three purchase orders for Morrill Road construction work was for less than \$25,001, thus technically avoiding the necessity of advertising for competitive bids for two weeks (see statutory bid requirements for public construction on pages 9-10), this was, in essence, splitting the bids, because all three invoices were for a portion of the same work effort. Bid-splitting is specifically prohibited by MISS. CODE ANN. Section 31-7-13 (o) (1972).

*Although MSU managers believed it would be permissible to construct the Memorial Seat Wall without soliciting bids if the cost was below \$4,450 per day, the university should have obtained at least two competitive written bids for the project because costs for the wall totaled \$21,686.*

**All of the construction work at the Memorial Seat Wall was related to one construction effort and thus the total cost of \$21,686 required a competitive purchasing method.**

As noted on page 12, to construct the memorial seat wall at Zacharias Village, MSU issued a purchase order. While the purchase order itself might have been an informal term contract with Gregory Construction Services to "provide specialized concrete work and construction and materials as needed," the work was all related and was for one construction effort (i. e., to construct a memorial seat wall in Zacharias Village); total costs were \$21,686. According to the statutory guidelines (see pages 9-10), MSU managers should have obtained at least two competitive written bids for constructing the wall or advertised for bids for the term contract.

*After analyzing MSU's use of the three above-described methods for procuring construction contracts, PEER concluded that because MSU circumvented state bid laws, the university's managers could not demonstrate that they had attempted to obtain the best price for construction services. Also, MSU's actions restricted the opportunity for contractors to compete for construction projects.*

While PEER acknowledges that state law does not require contracts for labor services to be let for bids, by purchasing labor and equipment through purchase orders and then buying materials separately, MSU managers circumvented the state bid laws. By not requesting bids from potential vendors, MSU managers could not demonstrate that the university attempted to obtain the

best price for construction services. MSU managers also restricted the opportunity for contractors to compete fairly by not advertising for small-scale construction projects over \$25,000 or soliciting at least two competitive bids for small-scale construction projects of over \$5,000 but not over \$25,000.

## No Statutory Definition of “Construction Project”

*State law does not specifically define “project” in relation to construction.*

In each of the three procurement methods discussed above and illustrated in Exhibits 1 through 3, managers at the MSU Department of Facilities Management and the Office of Procurement and Contracts did not consider related costs for an effort in the aggregate. In the methods cited above, the aggregate amount of costs (i. e., the cost of the entire *project*) for the effort would clearly place the work within the requirements of MISS. CODE ANN. Section 31-7-13 (1972) and thus would necessitate competitive procurement.

**A statutory definition of “construction project” would provide the scope and parameters of the activities that should be considered in their entirety in planning such efforts and in estimating their cost.**

While state law defines *construction* as “the process of building, altering, improving, renovating, or demolishing a public structure, public building, or other public real property,” the statutes do not specifically define “project” in relation to construction. However, since the statutory definition of “construction” includes “the *process* of building” and a construction project cannot be done without the necessary tasks, labor, equipment, and materials needed to complete the construction project, then PEER believes that a construction project must include the tasks, materials, labor, and equipment necessary to complete that construction project.

The *Bureau of Building Manual* defines a “project” as a “specific plan or undertaking” and the Department of Finance and Administration provided the following examples of what it considers to be “construction projects:”

- constructing a new building or other facility such as a port, lake, or road;
- constructing a parking lot or group of sidewalks to improve vehicular or pedestrian traffic flow;
- installing a new wayfinding system (i.e., signage);
- refurbishing a facility’s interior; or,
- reroofing a facility.

A statutory definition of “construction project” would provide the scope and parameters of the activities that should be considered in their entirety in planning such efforts and in estimating their cost. Such a definition would also provide clarity regarding the applicability of MISS. CODE ANN. Section 31-7-13 (o) (1972) to the purchase of construction work.

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## Chapter 3: What actions did MSU managers take after determining that the university's acquisition of some construction work did not comply with state law?

Managers of the MSU Department of Facilities Management and the Office of Procurement and Contracts began using term contracts in FY 2008 for small-scale construction projects. While term contracts are legal, competitive means for acquiring construction services, the flaws in MSU's Request for Proposals 07-52 and its evaluation process did not allow for determination of the lowest and best bidder and subjected the university to potential difficulties in controlling costs. By August 2008, MSU managers had ceased using term contracts and were using competitive methods of acquiring construction services that ensured that contracts were awarded to the lowest and best bidder.

To obtain the answer to this question, PEER sought the answers to several related, more specific questions:

- Why did MSU managers begin using term contracting for construction work in FY 2008?
- What problems existed with MSU's FY 2008 term contract for construction?
- What action did MSU managers take in response to contractors' complaints about the university's term contracts for construction?
- Did the university's term contracts comply with IHL policies and, if not, what action did IHL take?
- Subsequent to ending the FY 2008 term contract for construction, how have MSU managers acquired construction services?

### Why did MSU managers begin using term contracting for construction work in FY 2008?

*Because MSU's Director of the Office of Procurement and Contracts believed that the university was out of compliance with state bid laws, in FY 2008 the university began using term contracts for construction work.*

MSU's current Director of the Office of Procurement and Contracts began work in January 2007. He believed that MSU managers were out of compliance with the state's bid

laws for construction. However, MSU managers still desired a way to speed up the construction process by reducing the time between when the need for a construction project was identified and when construction began.

Upon reviewing state law and his previous purchasing experience, MSU's Director of the Office of Procurement and Contracts initiated the use of "term contracting" for construction. In regard to this method of procurement, MISS. CODE ANN. Section 31-7-13 (n) (i) (1972) states:

*All contracts for the purchase of commodities, equipment and public construction (including, but not limited to, repair and maintenance), may be let for periods of not more than sixty (60) months in advance, subject to applicable statutory provisions prohibiting the letting of contracts during specified periods near the end of terms of office. Term contracts for a period exceeding twenty-four (24) months shall also be subject to ratification or cancellation by governing authority boards taking office subsequent to the governing authority board entering the contract.*

**In FY 2008, MSU managers developed, bid, and issued a term contract for "carpentry, masonry, concrete, and dirt work."**

Because term contracting was allowed by state law and the director believed it to be a viable option for expediting construction, in FY 2008 MSU managers developed, bid, and issued a term contract for "carpentry, masonry, concrete, and dirt work." Request for Proposals (RFP) 07-52 was for an indefinite quantity of these types of work with an estimated 2,080 hours of service divided among four schedules, as follows:

- *Schedule 1: Carpentry*--an hourly rate schedule for carpentry personnel, any additional equipment, and a materials mark-up rate.
- *Schedule 2: Mason and Concrete Craftsmen*--an hourly rate schedule for mason and concrete craftsman personnel, any additional equipment, and a materials mark-up rate.
- *Schedule 3: Heavy Equipment*--an hourly rate schedule for heavy equipment (e. g., backhoes, bulldozers, dump trucks) and the personnel needed to oversee or operate the heavy equipment.
- *Schedule 4: Per Unit Items*--a contract for concrete forming and finishing for ten specific items, including new and replaced sidewalks,

curb and gutter, curb cuts for compliance with the Americans with Disabilities Act, and concrete steps.

**The RFP for this term contract did not guarantee either a minimum or maximum number of hours of work or amount of compensation; the term contract was limited only in regard to the period during which the contract would be in place.**

The RFP did not guarantee either a minimum or maximum number of hours of work or amount of compensation to the successful company or companies for any of these four schedules. The term contract was limited only in regard to the period during which the contract would be in place (i. e., July 1, 2007, through February 28, 2008, with an option for a mutually agreed extension of two additional twelve-month periods).

Five contractors responded to the RFP. MSU managers selected three contractors they believed to be the lowest and best bidders for each individual schedule, but their evaluation process was flawed (see pages 24 through 25). These contractors and the amounts paid to them are shown in Exhibit 4, page 23. (All amounts were for labor and equipment only and did not include materials.)

### **What problems existed with MSU's FY 2008 term contract for construction?**

***MSU's term contracts for campus-wide improvements (i. e., four schedules for specified construction services from July 2007 through June 2008) complied with state law, but the term contracting process needs improvement in order to promote competition among contractors and minimize costs.***

The National Institute of Governmental Purchasing (NIGP) defines a "term contract" as:

*A type of contract in which a source of supply is established for a specified period of time for specified services; usually characterized by an estimated or definite minimum quantity, with the possibility of additional requirements beyond the minimum, all at a predetermined unit price.*

**Exhibit 4: Term Contract for Construction Labor and Equipment, FY 2008**

<b>Name/Description</b>	<b>Date Span</b>	<b>Number of Projects</b>	<b>Cost</b>	<b>Number of Bidding Contractors</b>	<b>Winning Contractor</b>
Term Contract for Carpentry, Masonry, Concrete, and Dirt Work (RFP 07-52; Schedules 1-4)	July 18, 2007, through February 28, 2008, with two one-year options; extended, then terminated June 30, 2008	96 total projects	<b>\$1,680,534.10</b>  Total of all related invoices for 96 total projects		
<i>Schedule 1: Carpentry (hourly rate)*</i>		3	\$ 14,242.57	Four contractors	Weathers Construction
<i>Schedule 2: Mason and Concrete Craftsmen (hourly rate)*</i>		75	890,240.03	Five contractors	Gregory Construction Services
<i>Schedule 3: Heavy Equipment (hourly rate)*</i>		17	768,611.50	Five contractors	Gregory Construction Services
<i>Schedule 4: Concrete Forming and Finishing (per unit items)**</i>		1	7,440.00	Five contractors	RAFCO Contracting

\*All of these amounts were for labor and equipment only and did not include materials.

\*\*Schedule 4 costs included all materials except concrete and fiberglass reinforcement.

**Summary:** MSU's term contract for services requested in RFP 07-52 (July 18, 2007, through June 30, 2008) for carpentry, masonry, concrete, and dirt work complied with state law (although state law does not define "term contract"). However, this term contract did not allow determination of the lowest and best bidder and subjected the university to potential difficulties in controlling and managing hourly rate construction projects.

SOURCE: PEER analysis of bid files for RFP 07-52 and interviews with MSU staff.

If one considers the NIGP definition of term contracting, MSU complied with state law in issuing a term contract for RFP 07-52. However, PEER found the following problems with the type of contract that MSU issued in response to this RFP:

- *Because MSU bid the contracts on an hourly basis instead of on a unit price basis, it was difficult for the university to control costs (i. e., the contractor had an incentive to take longer to complete the work). Using an hourly rate contract also made it difficult for the university to determine fairly who was the winning bidder. The contractors were not bidding on a unit of guaranteed work, but on the cost per hour. Hence, there was no assurance that MSU received the lowest and best bid, just the lowest wage rate.*
- *As MSU's own internal audit report identified, scopes of work under Schedule 2 "Mason and Concrete Craftsman" and Schedule 4 "Per Unit Items" contained similar services (i. e., concrete, sidewalks, asphalt, curb and gutter). Therefore, for certain projects, there was no guarantee the lowest bidder was chosen because of the difficulty in comparing the schedules. For example, there is no equivalent for how many hours of "mason and concrete craftsman" labor, equipment, and materials (except concrete and fiberglass reinforcement) are equal to a 1,000 square feet of new sidewalk or 25 linear feet of saw cut asphalt or 200 linear feet of new curb and gutter.*
- *The RFP did not always clearly specify the equipment, personnel categories, and necessary costs (i. e., administrative, overhead, equipment) on which to bid. Also, the contract did not specify the materials mark-up rate. Thus bidders did not always have a "level playing field." For example, in Schedule 2, Gregory Construction Services did not include certain equipment as part of its submitted labor rate prices while RAFCO and Weathers did, thus allowing Gregory to have lower labor rate prices. As MSU's own internal audit report identified, Schedule 3 "Heavy Equipment" was too limited and did not take into account all of the different types and sizes of equipment typically used. For example, RAFCO bid \$70 per hour for a twenty-yard dump truck; Weathers bid \$60 per hour for an eight-yard dump truck; and, Gregory bid \$79 per hour for an undeclared size tandem dump truck.*

- *The RFP did not clearly define the evaluation criteria for determining lowest and best bidder. Also, the RFP did not include a weighted points scale for the criteria.*

Recognizing that flaws existed in the term contract issued for RFP 07-52, MSU managers terminated the RFP effective June 30, 2008, and issued a new invitation for bids and for similar contracts for 2008-2009. However, MSU managers continued to receive complaints from contractors about the legality of term contracts for public construction projects. The controversy ultimately resulted in MSU's cancellation of the July 2008 invitation for bids for similar term contracts.

### **What action did MSU managers take in response to contractors' complaints about term contracts for construction?**

***In response to contractors' complaints, in July 2008 MSU conducted an internal audit of construction procurement and instituted corrective action.***

As a result of complaints from contractors, in July 2008 MSU conducted its own internal audit that identified several areas in which MSU's bidding and construction practices were flawed. The audit report, *Construction Procurement Process Audit* (July 16, 2008) included the following:

- confirmed that the university split bids on at least one occasion (i. e., on the Morrill Road area construction) to circumvent state bidding requirements;
- noted that MSU's stipulation that the university be invoiced for no more than \$4,450 of work on any one day for the Memorial Seat Wall was based on an error in the Department of Facilities Management and Office of Procurement and Contracts managers' interpretation of the state's bid laws; and,
- noted that scopes of work in MSU's FY 2008 term contract under Schedule 2 "Mason and Concrete Craftsman" and Schedule 4 "Per Unit Items" contained similar services (i. e. concrete, sidewalks, asphalt, curb and gutter). Thus there was no guarantee that the lowest bidder was chosen because of the difficulty in comparing the schedules.

**The MSU Office of Procurement and Contracts conducted training related to purchase of construction for the Department of Facilities Management staff during the fall of 2008. Also, the office conducted several related training sessions for over 250 individuals across campus during the same period.**

The audit report also noted that in the FY 2008 term contract, the list of equipment for Schedule 3 (Heavy Equipment) was too general because the specifications did not include equipment types, sizes, and estimated hours of use.

At the recommendation of MSU's 2008 Internal Audit Report following the internal audit review into construction practices, the MSU Office of Procurement and Contracts conducted specific training for the Department of Facilities Management staff during the fall of 2008. Also, the office conducted several related training sessions for over 250 individuals across campus during the same period.

**Did the university's term contracts comply with IHL policies and, if not, what action did IHL take?**

***Because IHL Policy 707.01 limits the board's oversight to service contracts estimated to cost \$250,000 or more and the term contract for RFP 07-52 was an indefinite quantities service contract for construction with no defined cost, MSU managers did not submit the contract to IHL for review, despite total costs of over \$1.6 million.***

IHL Policy 707.01 requires the board's approval prior to the execution of the contract for all other land, personal property, and service contracts that require an aggregate total expenditure of more than \$250,000. Therefore, RFP 07-52 should have been submitted for approval by the board in order to be in effect as a labor-only service contract. However, since RFP 07-52 was an indefinite quantities contract, it was outside the parameters of the IHL policy.

**Subsequent to ending the university's FY 2008 term contract for construction, how have MSU managers acquired construction services?**

***By August 2008, MSU had ceased the use of term contracts and was using competitive methods of acquiring construction services that ensured that contracts were awarded to the lowest and best bidder.***

After complaints and inquiries regarding the legality of term contracts issued for RFP 07-52, MSU issued notice on

May 30, 2008, to the three contractors that had received the bid award (i. e., Gregory, Weathers, and RAFCO) stating that MSU was terminating the contracts effective June 30, 2008.

**Since the end of FY 2008, managers at the MSU Department of Facilities Management and Office of Procurement and Contracts have returned to using a competitive method of procurement for construction.**

Since that time, managers at the MSU Department of Facilities Management and Office of Procurement and Contracts have returned to using a competitive method of procurement for construction (i. e., developing specifications for a project, bidding it out as a whole project under the state bid laws, and having the lowest and best bidder perform the work on the construction project) and has complied with requirements of MISS. CODE ANN. Section 31-7-13 (1972). Examples of campus construction projects since August 2008 are shown in Exhibit 5, page 28.

**Exhibit 5: Examples of MSU's Acquisition of Construction Work, August 2008 to Present**

Name/Description of Example *	Cost	Number of Bidding Contractors	Winning Contractor (Lowest and Best Bidder)
Renovation of Chick-Fil-A space in Perry Hall*	\$10,295	Three contractors	Weathers Construction
Ballew Hall for concrete steps and sidewalks*	\$7,146	Four contractors	Weathers Construction
Agriculture and Biological Building Parking Lot*	\$879,933	Four contractors	Gregory Construction Services

\*These are only examples of the construction work during this period.

***Summary: In August 2008, MSU managers returned to developing specifications for construction projects, bidding them out as projects under the state bid laws, and having the lowest and best bidder perform the work on the construction project.***

SOURCE: PEER analysis of MSU bid files.

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## Chapter 4: Recommendations

PEER recognizes that some of the purchasing restrictions imposed by state law inhibit the universities' ability to expedite small-scale construction projects within the time frames related to funding and the academic calendar. In order to meet the university's construction needs within the desired time frames, from FY 2006 through FY 2008 MSU utilized methods of acquiring construction services that did not comply with or circumvented state law. In many cases, use of these procurement methods damaged the university's relationships with construction contractors.

The Legislature must balance the universities' small-scale construction needs and time frames with the need to maintain a fair and competitive environment for procuring university construction services at the lowest and best price, maximizing the yield from public funds.

Also, the Board of Trustees of State Institutions of Higher Learning should strengthen its policies regarding university construction projects. At present, even though term contracts for university construction could potentially cost more than the threshold amount requiring IHL approval, these contracts could escape IHL oversight.

PEER provides the following recommendations for ways to reduce the restrictions on university procurement practices for construction services, yet also maintain a fair and competitive environment in which contractors can compete for university construction projects.

1. The Legislature should amend MISS. CODE ANN. §31-7-1 (1972) to include the following definition of a "construction project:"

*"Construction project" shall mean a project including planning, design, preparation, and performance of a new capital improvement, alteration, conversion, fitting out, commissioning, major renovation or repair, demolition or decommissioning of any structure or infrastructure. The project scope shall be inclusive of scope of work, timeline and budget. The term "construction project" shall also include any or all necessary materials, labor, and equipment, needed to complete the project if such are contracted for separately.*

Such statutory definition would specifically require that an entity consider all related costs of construction efforts together as a construction project. Thus the entity would be required to compare aggregate costs of the effort to the cost thresholds specified in CODE Section 31-7-13 to determine which competitive procurement method should be utilized.

2. The Legislature should amend MISS. CODE ANN. Section 31-7-13 (n) (1972) to establish parameters for term contracts. The amendment should address the following:
  - define “term contract” and “indefinite delivery, indefinite quantities contract;”
  - separate the requirements and restrictions for indefinite delivery, indefinite quantities contracts for public construction from those of term contracts for commodities and equipment;
  - require the Department of Finance and Administration to approve indefinite delivery, indefinite quantities contracts for public construction (i. e., in order to use indefinite delivery, indefinite quantities contracts, universities would be required to submit to DFA’s oversight of term contracts) and to adopt regulations necessary to administer them;
  - prohibit hourly rate indefinite delivery, indefinite quantities contracts for state entities, except when specifically approved by DFA. Local governing authorities (e. g., cities, school districts, community colleges), however, would not be allowed to use hourly rate contracts for any reason;
  - limit the time frame of indefinite delivery, indefinite quantities contracts to one base year and limit the maximum number of option years to three;
  - impose a maximum cost limit of \$3 million per year on term contracts for public construction and a maximum cost per construction project of \$500,000; and,
  - require vendors seeking indefinite delivery, indefinite quantities contracts for public construction to hold a current certificate of responsibility from the Board of Public

Contractors for any term contract unless the term contract explicitly prohibits projects that exceed \$50,000.

See the Appendix, page 33, for a proposed draft amendment to CODE Section 31-7-13 (n) (1972).

If state law were thus amended, it would provide an option for universities, as well as other public entities, to procure construction services more efficiently. Thus if the need arose and funding were available, a public entity could move quickly to the construction phase without having to develop detailed specifications and solicit bids for each individual small-scale construction project.

3. In the event that the Legislature adopts the bill proposed on page 33, the board should adopt the same threshold for approval for indefinite delivery, indefinite quantities contracts that DFA adopts in its rules and regulations. If the proposed legislation is not adopted, the Board of Trustees of State Institutions of Higher Learning should approve all term contracts that have no set maximum price.
4. Mississippi State University should ensure that personnel of the Department of Facilities Management and the Office of Procurement and Contracts, as well as the university's construction contractors, understand the requirements of laws, policies, and procedures concerning the procurement of construction services.



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## Appendix: Proposed Legislation to Amend MISS. CODE ANN. Section 31-7-1 and 31-7-13 (1972)

Mississippi Legislature

Regular Session 2010

BY:

### BILL

AN ACT TO AMEND SECTION 31-7-1, MISSISSIPPI CODE OF 1972, TO DEFINE THE TERM "CONSTRUCTION PROJECT;" TO AMEND SECTION 31-7-13, MISSISSIPPI CODE OF 1972, TO SET OUT THE CONDITIONS UNDER WHICH AGENCIES AND GOVERNING AUTHORITIES MAY PROCURE TERM CONTRACTS FOR COMMODITIES AND EQUIPMENT AND INDEFINITE DELIVERY, INDEFINITE QUANTITIES CONTRACTS FOR PUBLIC CONSTRUCTION; TO DEFINE CERTAIN TERMS; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

Section 1. Section 31-7-1, Mississippi Code of 1972, is amended as follows:

~~§ 31-7-1. Definitions.~~

The following terms are defined for the purposes of this chapter to have the following meanings:

(a) "Agency" shall mean any state board, commission, committee, council, university, department or unit thereof created by the Constitution or statutes if such board, commission, committee, council, university, department, unit or the head thereof is authorized to appoint subordinate staff by the Constitution or statute, except a legislative or judicial board, commission, committee, council, department or unit thereof.

(b) "Governing authority" shall mean boards of supervisors, governing boards of all school districts, all boards of directors of public water supply districts, boards of directors of master public water supply districts, municipal public utility commissions, governing authorities of all municipalities, port authorities, commissioners and boards of trustees of any public hospitals, boards of trustees of public library systems, district attorneys, school attendance officers and any political subdivision of the state supported wholly or in part by public funds of the state or political subdivisions thereof, including commissions, boards and agencies created or operated under the authority of any county or municipality of this state. The term "governing authority" shall not include economic development authorities supported in part by private funds, or commissions appointed to hold title to and oversee the development and management of lands and buildings which are donated by private individuals to the public for the use and benefit of the community and which are supported in part by private funds.

(c) "Purchasing agent" shall mean any administrator, superintendent, purchase clerk or other chief officer so designated having general or special authority to negotiate for and make private contract for or purchase for any governing authority or agency.

(d) “Public funds” shall mean and include any appropriated funds, special funds, fees or any other emoluments received by an agency or governing authority.

(e) “Commodities” shall mean and include the various commodities, goods, merchandise, furniture, equipment, automotive equipment of every kind, and other personal property purchased by the agencies of the state and governing authorities, but not commodities purchased for resale or raw materials converted into products for resale.

(i) “Equipment” shall be construed to include: automobiles, trucks, tractors, office appliances and all other equipment of every kind and description.

(ii) “Furniture” shall be construed to include: desks, chairs, tables, seats, filing cabinets, bookcases and all other items of a similar nature as well as dormitory furniture, appliances, carpets and all other items of personal property generally referred to as home, office or school furniture.

(f) “Emergency” shall mean any circumstances caused by fire, flood, explosion, storm, earthquake, epidemic, riot, insurrection or caused by any inherent defect due to defective construction, or when the immediate preservation of order or of public health is necessary by reason of unforeseen emergency, or when the immediate restoration of a condition of usefulness of any public building, equipment, road or bridge appears advisable, or in the case of a public utility when there is a failure of any machine or other thing used and useful in the generation, production or distribution of electricity, water or natural gas, or in the transportation or treatment of sewage; or when the delay incident to obtaining competitive bids could cause adverse impact upon the governing authorities or agency, its employees or its citizens; or in the case of a public airport, when the delay incident to publishing an advertisement for competitive bids would endanger public safety in a specific (not general) manner, result in or perpetuate a specific breach of airport security, or prevent the airport from providing specific air transportation services.

(g) “Construction” shall mean the process of building, altering, improving, renovating or demolishing a public structure, public building, or other public real property. It does not include routine operation, routine repair or regularly scheduled maintenance of existing public structures, public buildings or other public real property. Construction consists of one or more construction projects.

(h) “Construction project” shall mean a project including planning, design, preparation, and performance of a new capital improvement, alteration, conversion, fitting out, commissioning, major renovation or repair, demolition or decommissioning of any structure or infrastructure. The project scope shall be inclusive of scope of work, timeline and budget. The term “construction project” shall also include any or all necessary materials, labor, and equipment needed to complete the project if such are contracted for separately.

(i) “Purchase” shall mean buying, renting, leasing or otherwise acquiring.

(j) “Certified purchasing office” shall mean any purchasing office wherein fifty percent (50%) or more of the purchasing agents hold a certification from the Universal Public Purchasing Certification Council or other nationally recognized purchasing certification.

Sources: Codes, 1942, §§ 9024-01, 9024-10, 9024.5; Laws, 1958, ch. 480, §§ 1-4; Laws, 1962, ch. 497, §§ 1, 13; Laws, 1968, ch. 506, § 21; Laws, 1980, ch. 440, § 1; Laws, 1981, ch. 306, § 1; Laws, 1984, ch. 488, § 152; Laws, 1985, ch. 525, § 13; Laws, 1988, ch. 589, §

~~22; Laws, 1988 Ex Sess, ch. 14, § 63; Laws, 1990, ch. 585, § 1; Laws, 1993, ch. 556, § 1; Laws, 1996, ch. 404, § 2; Laws, 1999, ch. 335, § 1; Laws, 2000, ch. 593, § 2; Laws, 2003, ch. 539, § 3; Laws, 2004, ch. 390, § 1, eff from and after passage (approved Apr. 20, 2004.)~~

Section 2. Section 31-7-13, Mississippi Code of 1972, is amended as follows:

~~§ 31-7-13. Bid requirements and exceptions; public auctions [Subsection (c)(i)(2) repealed on July 1, 2011].~~

All agencies and governing authorities shall purchase their commodities and printing; contract for garbage collection or disposal; contract for solid waste collection or disposal; contract for sewage collection or disposal; contract for public construction and contract for rentals as herein provided.

(a) Bidding procedure for purchases not over \$5,000.00. Purchases which do not involve an expenditure of more than Five Thousand Dollars (\$5,000.00), exclusive of freight or shipping charges, may be made without advertising or otherwise requesting competitive bids. However, nothing contained in this paragraph (a) shall be construed to prohibit any agency or governing authority from establishing procedures which require competitive bids on purchases of Five Thousand Dollars (\$5,000.00) or less.

(b) Bidding procedure for purchases over \$5,000.00 but not over \$25,000.00. Purchases which involve an expenditure of more than Five Thousand Dollars (\$5,000.00) but not more than Twenty-five Thousand Dollars (\$25,000.00), exclusive of freight and shipping charges may be made from the lowest and best bidder without publishing or posting advertisement for bids, provided at least two (2) competitive written bids have been obtained. Any governing authority purchasing commodities pursuant to this paragraph (b) may authorize its purchasing agent, or his designee, with regard to governing authorities other than counties, or its purchase clerk, or his designee, with regard to counties, to accept the lowest and best competitive written bid. Such authorization shall be made in writing by the governing authority and shall be maintained on file in the primary office of the agency and recorded in the official minutes of the governing authority, as appropriate. The purchasing agent or the purchase clerk, or their designee, as the case may be, and not the governing authority, shall be liable for any penalties and/or damages as may be imposed by law for any act or omission of the purchasing agent or purchase clerk, or their designee, constituting a violation of law in accepting any bid without approval by the governing authority. The term "competitive written bid" shall mean a bid submitted on a bid form furnished by the buying agency or governing authority and signed by authorized personnel representing the vendor, or a bid submitted on a vendor's letterhead or identifiable bid form and signed by authorized personnel representing the vendor. "Competitive" shall mean that the bids are developed based upon comparable identification of the needs and are developed independently and without knowledge of other bids or prospective bids. Bids may be submitted by facsimile, electronic mail or other generally accepted method of information distribution. Bids submitted by electronic transmission shall not require the signature of the vendor's representative unless required by agencies or governing authorities.

(c) Bidding procedure for purchases over \$25,000.00.

(i) Publication requirement.

1. Purchases which involve an expenditure of more than Twenty-five Thousand Dollars (\$25,000.00), exclusive of freight and shipping charges, may be made from the lowest and best bidder after advertising for competitive bids once each week for two (2) consecutive weeks in a regular newspaper published in the county or municipality in which such agency or governing authority is located.

2. The purchasing entity may designate the method by which the bids will be received, including, but not limited to, bids sealed in an envelope, bids received electronically in a secure system, bids received via a reverse auction, or bids received by any other method that promotes open competition and has been approved by the Office of Purchasing and Travel. The provisions of this part 2 of subparagraph (i) shall be repealed on July 1, 2011.

3. The date as published for the bid opening shall not be less than seven (7) working days after the last published notice; however, if the purchase involves a construction project in which the estimated cost is in excess of Twenty-five Thousand Dollars (\$25,000.00), such bids shall not be opened in less than fifteen (15) working days after the last notice is published and the notice for the purchase of such construction shall be published once each week for two (2) consecutive weeks. The notice of intention to let contracts or purchase equipment shall state the time and place at which bids shall be received, list the contracts to be made or types of equipment or supplies to be purchased, and, if all plans and/or specifications are not published, refer to the plans and/or specifications on file. If there is no newspaper published in the county or municipality, then such notice shall be given by posting same at the courthouse, or for municipalities at the city hall, and at two (2) other public places in the county or municipality, and also by publication once each week for two (2) consecutive weeks in some newspaper having a general circulation in the county or municipality in the above provided manner. On the same date that the notice is submitted to the newspaper for publication, the agency or governing authority involved shall mail written notice to, or provide electronic notification to the main office of the Mississippi Procurement Technical Assistance Program under the Mississippi Development Authority that contains the same information as that in the published notice.

(ii) Bidding process amendment procedure. If all plans and/or specifications are published in the notification, then the plans and/or specifications may not be amended. If all plans and/or specifications are not published in the notification, then amendments to the plans/specifications, bid opening date, bid opening time and place may be made, provided that the agency or governing authority maintains a list of all prospective bidders who are known to have received a copy of the bid documents and all such prospective bidders are sent copies of all amendments. This notification of amendments may be made via mail, facsimile, electronic mail or other generally accepted method of information distribution. No addendum to bid specifications may be issued within two (2) working days of the time established for the receipt of bids unless such addendum also amends the bid opening to a date not less than five (5) working days after the date of the addendum.

(iii) Filing requirement. In all cases involving governing authorities, before the notice shall be published or posted, the plans or specifications for the construction or equipment being sought shall be filed with the clerk of the board of the governing authority. In addition to these requirements, a bid file shall be established which shall indicate those vendors to whom such solicitations and specifications were issued, and such file shall also contain such information as is pertinent to the bid.

(iv) Specification restrictions.

1. Specifications pertinent to such bidding shall be written so as not to exclude comparable equipment of domestic manufacture. However, if valid justification is presented, the Department of Finance and Administration or the board of a governing authority may approve a request for specific equipment necessary to perform a specific job. Further, such justification, when placed on the minutes of the board of a governing authority, may serve as authority for that governing authority to write specifications to require a specific item of equipment needed to perform a specific job. In addition to these requirements, from and after July 1, 1990, vendors of relocatable classrooms and the specifications for the purchase of such relocatable classrooms published by local school boards shall meet all pertinent regulations of the State Board of Education, including prior approval of such bid by the State Department of Education.

2. Specifications for construction projects may include an allowance for commodities, equipment, furniture, construction materials or systems in which prospective bidders are instructed to include in their bids specified amounts for such items so long as the allowance items are acquired by the vendor in a commercially reasonable manner and approved by the agency/governing authority. Such acquisitions shall not be made to circumvent the public purchasing laws.

(v) Agencies and governing authorities may establish secure procedures by which bids may be submitted via electronic means.

(d) Lowest and best bid decision procedure.

(i) Decision procedure. Purchases may be made from the lowest and best bidder. In determining the lowest and best bid, freight and shipping charges shall be included. Life-cycle costing, total cost bids, warranties, guaranteed buy-back provisions and other relevant provisions may be included in the best bid calculation. All best bid procedures for state agencies must be in compliance with regulations established by the Department of Finance and Administration. If any governing authority accepts a bid other than the lowest bid actually submitted, it shall place on its minutes detailed calculations and narrative summary showing that the accepted bid was determined to be the lowest and best bid, including the dollar amount of the accepted bid and the dollar amount of the lowest bid. No agency or governing authority shall accept a bid based on items not included in the specifications.

(ii) Decision procedure for Certified Purchasing Offices. In addition to the decision procedure set forth in paragraph (d) (i), Certified Purchasing Offices may also use the following procedure: Purchases may be made from the bidder offering the best value. In determining the best value bid, freight and shipping charges shall be included. Life-cycle costing, total cost bids, warranties, guaranteed buy-back provisions, documented previous experience, training costs and other relevant provisions may be included in the best value calculation. This provision shall authorize Certified Purchasing Offices to utilize a Request For Proposals (RFP) process when purchasing commodities. All best value procedures for state agencies must be in compliance with regulations established by the Department of Finance and Administration. No agency or governing authority shall accept a bid based on items or criteria not included in the specifications.

(iii) Construction project negotiations authority. If the lowest and best bid is not more than ten percent (10%) above the amount of funds allocated for a public construction or renovation project, then the agency or governing authority shall be permitted to negotiate with the lowest bidder in order to enter into a contract for an amount not to exceed the funds allocated.

(e) Lease-purchase authorization. For the purposes of this section, the term “equipment” shall mean equipment, furniture and, if applicable, associated software and other applicable direct costs associated with the acquisition. Any lease-purchase of equipment which an agency is not required to lease-purchase under the master lease-purchase program pursuant to Section 31-7-10 and any lease-purchase of equipment which a governing authority elects to lease-purchase may be acquired by a lease-purchase agreement under this paragraph (e). Lease-purchase financing may also be obtained from the vendor or from a third-party source after having solicited and obtained at least two (2) written competitive bids, as defined in paragraph (b) of this section, for such financing without advertising for such bids. Solicitation for the bids for financing may occur before or after acceptance of bids for the purchase of such equipment or, where no such bids for purchase are required, at any time before the purchase thereof. No such lease-purchase agreement shall be for an annual rate of interest which is greater than the overall maximum interest rate to maturity on general obligation indebtedness permitted under Section 75-17-101, and the term of such lease-purchase agreement shall not exceed the useful life of equipment covered thereby as determined according to the upper limit of the asset depreciation range (ADR) guidelines for the Class Life Asset Depreciation Range System established by the Internal Revenue Service pursuant to the United States Internal Revenue Code and regulations thereunder as in effect on December 31, 1980, or comparable depreciation guidelines with respect to any equipment not covered by ADR guidelines. Any lease-purchase agreement entered into pursuant to this paragraph (e) may contain any of the terms and conditions which a master lease-purchase agreement may contain under the provisions of Section 31-7-10(5), and shall contain an annual allocation dependency clause substantially similar to that set forth in Section 31-7-10(8). Each agency or governing authority entering into a lease-purchase transaction pursuant to this paragraph (e) shall maintain with respect to each such lease-purchase transaction the same information as required to be maintained by the Department of Finance and Administration pursuant to Section 31-7-10(13). However, nothing contained in this section shall be construed to permit agencies to acquire items of equipment with a total acquisition cost in the aggregate of less than Ten Thousand Dollars (\$10,000.00) by a single lease-purchase transaction. All equipment, and the purchase thereof by any lessor, acquired by lease-purchase under this paragraph and all lease-purchase payments with respect thereto shall be exempt from all Mississippi sales, use and ad valorem taxes. Interest paid on any lease-purchase agreement under this section shall be exempt from State of Mississippi income taxation.

(f) Alternate bid authorization. When necessary to ensure ready availability of commodities for public works and the timely completion of public projects, no more than two (2) alternate bids may be accepted by a governing authority for commodities. No purchases may be made through use of such alternate bids procedure unless the lowest and best bidder cannot deliver the commodities contained in his bid. In that event, purchases of such commodities may be made from one (1) of the bidders whose bid was accepted as an alternate.

(g) Construction contract change authorization. In the event a determination is made by an agency or governing authority after a construction contract is let that changes or modifications to the original contract are necessary or would better serve the purpose of the agency or the governing authority, such agency or governing authority may, in its discretion, order such changes pertaining to the construction that are necessary under the circumstances without the necessity of further public bids; provided that such change shall be made in a commercially reasonable manner and shall not be made to circumvent the public purchasing statutes. In addition to any other authorized person, the architect or engineer hired by an agency or governing authority with respect to any public construction contract shall have the authority, when granted by an agency or governing authority, to authorize changes or modifications to the original contract

without the necessity of prior approval of the agency or governing authority when any such change or modification is less than one percent (1%) of the total contract amount. The agency or governing authority may limit the number, manner or frequency of such emergency changes or modifications.

(h) Petroleum purchase alternative. In addition to other methods of purchasing authorized in this chapter, when any agency or governing authority shall have a need for gas, diesel fuel, oils and/or other petroleum products in excess of the amount set forth in paragraph (a) of this section, such agency or governing authority may purchase the commodity after having solicited and obtained at least two (2) competitive written bids, as defined in paragraph (b) of this section. If two (2) competitive written bids are not obtained, the entity shall comply with the procedures set forth in paragraph (c) of this section. In the event any agency or governing authority shall have advertised for bids for the purchase of gas, diesel fuel, oils and other petroleum products and coal and no acceptable bids can be obtained, such agency or governing authority is authorized and directed to enter into any negotiations necessary to secure the lowest and best contract available for the purchase of such commodities.

(i) Road construction petroleum products price adjustment clause authorization. Any agency or governing authority authorized to enter into contracts for the construction, maintenance, surfacing or repair of highways, roads or streets, may include in its bid proposal and contract documents a price adjustment clause with relation to the cost to the contractor, including taxes, based upon an industry-wide cost index, of petroleum products including asphalt used in the performance or execution of the contract or in the production or manufacture of materials for use in such performance. Such industry-wide index shall be established and published monthly by the Mississippi Department of Transportation with a copy thereof to be mailed, upon request, to the clerks of the governing authority of each municipality and the clerks of each board of supervisors throughout the state. The price adjustment clause shall be based on the cost of such petroleum products only and shall not include any additional profit or overhead as part of the adjustment. The bid proposals or document contract shall contain the basis and methods of adjusting unit prices for the change in the cost of such petroleum products.

(j) State agency emergency purchase procedure. If the governing board or the executive head, or his designee, of any agency of the state shall determine that an emergency exists in regard to the purchase of any commodities or repair contracts, so that the delay incident to giving opportunity for competitive bidding would be detrimental to the interests of the state, then the provisions herein for competitive bidding shall not apply and the head of such agency shall be authorized to make the purchase or repair. Total purchases so made shall only be for the purpose of meeting needs created by the emergency situation. In the event such executive head is responsible to an agency board, at the meeting next following the emergency purchase, documentation of the purchase, including a description of the commodity purchased, the purchase price thereof and the nature of the emergency shall be presented to the board and placed on the minutes of the board of such agency. The head of such agency, or his designee, shall, at the earliest possible date following such emergency purchase, file with the Department of Finance and Administration (i) a statement explaining the conditions and circumstances of the emergency, which shall include a detailed description of the events leading up to the situation and the negative impact to the entity if the purchase is made following the statutory requirements set forth in paragraph (a), (b) or (c) of this section, and (ii) a certified copy of the appropriate minutes of the board of such agency, if applicable.

(k) Governing authority emergency purchase procedure. If the governing authority, or the governing authority acting through its designee, shall determine that an emergency exists in regard to the purchase of any commodities or repair contracts, so that the

delay incident to giving opportunity for competitive bidding would be detrimental to the interest of the governing authority, then the provisions herein for competitive bidding shall not apply and any officer or agent of such governing authority having general or special authority therefor in making such purchase or repair shall approve the bill presented therefor, and he shall certify in writing thereon from whom such purchase was made, or with whom such a repair contract was made. At the board meeting next following the emergency purchase or repair contract, documentation of the purchase or repair contract, including a description of the commodity purchased, the price thereof and the nature of the emergency shall be presented to the board and shall be placed on the minutes of the board of such governing authority.

(l) (i) Hospital purchase, lease-purchase and lease authorization. The commissioners or board of trustees of any public hospital may contract with such lowest and best bidder for the purchase or lease-purchase of any commodity under a contract of purchase or lease-purchase agreement whose obligatory payment terms do not exceed five (5) years.

(ii) In addition to the authority granted in subparagraph (i) of this paragraph (l), the commissioners or board of trustees is authorized to enter into contracts for the lease of equipment or services, or both, which it considers necessary for the proper care of patients if, in its opinion, it is not financially feasible to purchase the necessary equipment or services. Any such contract for the lease of equipment or services executed by the commissioners or board shall not exceed a maximum of five (5) years' duration and shall include a cancellation clause based on unavailability of funds. If such cancellation clause is exercised, there shall be no further liability on the part of the lessee. Any such contract for the lease of equipment or services executed on behalf of the commissioners or board that complies with the provisions of this subparagraph (ii) shall be excepted from the bid requirements set forth in this section.

(m) Exceptions from bidding requirements. Excepted from bid requirements are:

(i) Purchasing agreements approved by department. Purchasing agreements, contracts and maximum price regulations executed or approved by the Department of Finance and Administration.

(ii) Outside equipment repairs. Repairs to equipment, when such repairs are made by repair facilities in the private sector; however, engines, transmissions, rear axles and/or other such components shall not be included in this exemption when replaced as a complete unit instead of being repaired and the need for such total component replacement is known before disassembly of the component; however, invoices identifying the equipment, specific repairs made, parts identified by number and name, supplies used in such repairs, and the number of hours of labor and costs therefor shall be required for the payment for such repairs.

(iii) In-house equipment repairs. Purchases of parts for repairs to equipment, when such repairs are made by personnel of the agency or governing authority; however, entire assemblies, such as engines or transmissions, shall not be included in this exemption when the entire assembly is being replaced instead of being repaired.

(iv) Raw gravel or dirt. Raw unprocessed deposits of gravel or fill dirt which are to be removed and transported by the purchaser.

(v) Governmental equipment auctions. Motor vehicles or other equipment purchased from a federal agency or authority, another governing authority or state agency of the State of Mississippi, or any governing authority or state agency of another state at a public auction held for the purpose of disposing of such vehicles or other equipment.

Any purchase by a governing authority under the exemption authorized by this subparagraph (v) shall require advance authorization spread upon the minutes of the governing authority to include the listing of the item or items authorized to be purchased and the maximum bid authorized to be paid for each item or items.

(vi) Intergovernmental sales and transfers. Purchases, sales, transfers or trades by governing authorities or state agencies when such purchases, sales, transfers or trades are made by a private treaty agreement or through means of negotiation, from any federal agency or authority, another governing authority or state agency of the State of Mississippi, or any state agency or governing authority of another state. Nothing in this section shall permit such purchases through public auction except as provided for in subparagraph (v) of this section. It is the intent of this section to allow governmental entities to dispose of and/or purchase commodities from other governmental entities at a price that is agreed to by both parties. This shall allow for purchases and/or sales at prices which may be determined to be below the market value if the selling entity determines that the sale at below market value is in the best interest of the taxpayers of the state. Governing authorities shall place the terms of the agreement and any justification on the minutes, and state agencies shall obtain approval from the Department of Finance and Administration, prior to releasing or taking possession of the commodities.

(vii) Perishable supplies or food. Perishable supplies or food purchased for use in connection with hospitals, the school lunch programs, homemaking programs and for the feeding of county or municipal prisoners.

(viii) Single source items. Noncompetitive items available from one (1) source only. In connection with the purchase of noncompetitive items only available from one (1) source, a certification of the conditions and circumstances requiring the purchase shall be filed by the agency with the Department of Finance and Administration and by the governing authority with the board of the governing authority. Upon receipt of that certification the Department of Finance and Administration or the board of the governing authority, as the case may be, may, in writing, authorize the purchase, which authority shall be noted on the minutes of the body at the next regular meeting thereafter. In those situations, a governing authority is not required to obtain the approval of the Department of Finance and Administration.

(ix) Waste disposal facility construction contracts. Construction of incinerators and other facilities for disposal of solid wastes in which products either generated therein, such as steam, or recovered therefrom, such as materials for recycling, are to be sold or otherwise disposed of; however, in constructing such facilities, a governing authority or agency shall publicly issue requests for proposals, advertised for in the same manner as provided herein for seeking bids for public construction projects, concerning the design, construction, ownership, operation and/or maintenance of such facilities, wherein such requests for proposals when issued shall contain terms and conditions relating to price, financial responsibility, technology, environmental compatibility, legal responsibilities and such other matters as are determined by the governing authority or agency to be appropriate for inclusion; and after responses to the request for proposals have been duly received, the governing authority or agency may select the most qualified proposal or proposals on the basis of price, technology and other relevant factors and from such proposals, but not limited to the terms thereof, negotiate and enter contracts with one or more of the persons or firms submitting proposals.

(x) Hospital group purchase contracts. Supplies, commodities and equipment purchased by hospitals through group purchase programs pursuant to Section 31-7-38.

(xi) Information technology products. Purchases of information technology products made by governing authorities under the provisions of purchase schedules, or contracts executed or approved by the Mississippi Department of Information Technology Services and designated for use by governing authorities.

(xii) Energy efficiency services and equipment. Energy efficiency services and equipment acquired by school districts, community and junior colleges, institutions of higher learning and state agencies or other applicable governmental entities on a shared-savings, lease or lease-purchase basis pursuant to Section 31-7-14.

(xiii) Municipal electrical utility system fuel. Purchases of coal and/or natural gas by municipally owned electric power generating systems that have the capacity to use both coal and natural gas for the generation of electric power.

(xiv) Library books and other reference materials. Purchases by libraries or for libraries of books and periodicals; processed film, video cassette tapes, filmstrips and slides; recorded audio tapes, cassettes and diskettes; and any such items as would be used for teaching, research or other information distribution; however, equipment such as projectors, recorders, audio or video equipment, and monitor televisions are not exempt under this subparagraph.

(xv) Unmarked vehicles. Purchases of unmarked vehicles when such purchases are made in accordance with purchasing regulations adopted by the Department of Finance and Administration pursuant to Section 31-7-9(2).

(xvi) Election ballots. Purchases of ballots printed pursuant to Section 23-15-351.

(xvii) Multichannel interactive video systems. From and after July 1, 1990, contracts by Mississippi Authority for Educational Television with any private educational institution or private nonprofit organization whose purposes are educational in regard to the construction, purchase, lease or lease-purchase of facilities and equipment and the employment of personnel for providing multichannel interactive video systems (ITSF) in the school districts of this state.

(xviii) Purchases of prison industry products. From and after January 1, 1991, purchases made by state agencies or governing authorities involving any item that is manufactured, processed, grown or produced from the state's prison industries.

(xix) Undercover operations equipment. Purchases of surveillance equipment or any other high-tech equipment to be used by law enforcement agents in undercover operations, provided that any such purchase shall be in compliance with regulations established by the Department of Finance and Administration.

(xx) Junior college books for rent. Purchases by community or junior colleges of textbooks which are obtained for the purpose of renting such books to students as part of a book service system.

(xxi) Certain school district purchases. Purchases of commodities made by school districts from vendors with which any levying authority of the school district, as defined in Section 37-57-1, has contracted through competitive bidding procedures for purchases of the same commodities.

(xxii) Garbage, solid waste and sewage contracts. Contracts for garbage collection or disposal, contracts for solid waste collection or disposal and contracts for sewage collection or disposal.

(xxiii) Municipal water tank maintenance contracts. Professional maintenance program contracts for the repair or maintenance of municipal water tanks, which provide professional services needed to maintain municipal water storage tanks for a fixed annual fee for a duration of two (2) or more years.

(xxiv) Purchases of Mississippi Industries for the Blind products. Purchases made by state agencies or governing authorities involving any item that is manufactured, processed or produced by the Mississippi Industries for the Blind.

(xxv) Purchases of state-adopted textbooks. Purchases of state-adopted textbooks by public school districts.

(xxvi) Certain purchases under the Mississippi Major Economic Impact Act. Contracts entered into pursuant to the provisions of Section 57-75-9(2) and (3).

(xxvii) Used heavy or specialized machinery or equipment for installation of soil and water conservation practices purchased at auction. Used heavy or specialized machinery or equipment used for the installation and implementation of soil and water conservation practices or measures purchased subject to the restrictions provided in Sections 69-27-331 through 69-27-341. Any purchase by the State Soil and Water Conservation Commission under the exemption authorized by this subparagraph shall require advance authorization spread upon the minutes of the commission to include the listing of the item or items authorized to be purchased and the maximum bid authorized to be paid for each item or items.

(xxviii) Hospital lease of equipment or services. Leases by hospitals of equipment or services if the leases are in compliance with paragraph (l)(ii).

(xxix) Purchases made pursuant to qualified cooperative purchasing agreements. Purchases made by certified purchasing offices of state agencies or governing authorities under cooperative purchasing agreements previously approved by the Office of Purchasing and Travel and established by or for any municipality, county, parish or state government or the federal government, provided that the notification to potential contractors includes a clause that sets forth the availability of the cooperative purchasing agreement to other governmental entities. Such purchases shall only be made if the use of the cooperative purchasing agreements is determined to be in the best interest of the governmental entity.

(xxx) School yearbooks. Purchases of school yearbooks by state agencies or governing authorities; provided, however, that state agencies and governing authorities shall use for these purchases the RFP process as set forth in the Mississippi Procurement Manual adopted by the Office of Purchasing and Travel.

(xxxi) Design-build method and dual-phase design-build method of contracting. Contracts entered into under the provisions of Section 31-7-13.1, 37-101-44 or 65-1-85.

(xxxii) Toll roads and bridge construction projects. Contracts entered into under the provisions of Section 65-43-1 or 65-43-3.

(n) Term contract authorization. ~~All contracts for the purchase of:~~

(i) The following terms shall have the meanings ascribed to them herein.

1. A “term contract” is any contract covering purchases made during a specified time period.

2. An “indefinite delivery, indefinite quantities contract” is a term contract that provides for an indefinite quantity, within stated limits, of defined units of construction (inclusive of all overhead, profit margin, labor, materials, and equipment necessary to construct the unit of construction) during a fixed period.

(ii) Term contract authorization for the purchase of commodities and equipment: Agencies and governing authorities may utilize term contracts for the procurement of equipment and commodities as provided for by this sub-paragraph (ii).

1. All term contracts for the purchase of commodities and equipment may be let for periods of not more than sixty (60) months in advance, subject to applicable statutory provisions prohibiting the letting of contracts during specified periods near the end of terms of office. Term contracts for the purchase of commodities and equipment for a period exceeding twenty-four (24) months shall also be subject to ratification or cancellation by governing authority boards taking office subsequent to the governing authority board entering the contract.

2. Bid proposals and contracts may include price adjustment clauses with relation to the cost to the contractor based upon a nationally published industry-wide or nationally published and recognized cost index. The cost index used in a price adjustment clause shall be determined by the Department of Finance and Administration for the state agencies and by the governing board for governing authorities. The bid proposal and contract documents utilizing a price adjustment clause shall contain the basis and method of adjusting unit prices for the change in the cost of such commodities and equipment.

~~(i) All contracts for the purchase of commodities, equipment and public construction (including, but not limited to, repair and maintenance), may be let for periods of not more than sixty (60) months in advance, subject to applicable statutory provisions prohibiting the letting of contracts during specified periods near the end of terms of office. Term contracts for a period exceeding twenty-four (24) months shall also be subject to ratification or cancellation by governing authority boards taking office subsequent to the governing authority board entering the contract.~~

~~(ii) Bid proposals and contracts may include price adjustment clauses with relation to the cost to the contractor based upon a nationally published industry-wide or nationally published and recognized cost index. The cost index used in a price adjustment clause shall be determined by the Department of Finance and Administration for the state agencies and by the governing board for governing authorities. The bid proposal and contract documents utilizing a price adjustment clause shall contain the basis and method of adjusting unit prices for the change in the cost of such commodities, equipment and public construction.~~

(iii) Indefinite delivery, indefinite quantities contract authorization for the purchase of public construction including, but not limited to, repair and maintenance: Agencies and governing authorities may enter into indefinite delivery, indefinite quantities contracts as provided for in this sub-paragraph (iii).

1. Indefinite delivery, indefinite quantities contracts for public construction may be let for periods of not more than six (6) months in advance of commencement of indefinite delivery, indefinite quantities contracts, subject to applicable statutory provisions prohibiting the letting of contracts during specified periods near the end of terms of

office. Indefinite delivery, indefinite quantities contracts for a period exceeding twenty-four (24) months shall also be subject to ratification or cancellation by governing authority boards taking office subsequent to the governing authority board entering the contract.

2. No indefinite delivery, indefinite quantities contracts for public construction shall be bid out on an hourly rate basis except as provided for in this provision. The Department of Finance and Administration may approve an hourly rate indefinite delivery, indefinite quantities contract for a state agency or institution of higher learning only upon a determination that such approval is in the best interests of the requesting institution or agency. The Department shall maintain a record of all such approvals and the basis for its decision for approval.

3. Indefinite delivery, indefinite quantities contracts for public construction shall be limited to one base year with no more than three option years.

4. Indefinite delivery, indefinite quantities contracts for public construction shall be limited to a total expenditure of Three Million Dollars (\$3,000,000.00) per base year as well as Three Million Dollars (\$3,000,000.00) per option year.

5. Work performed under indefinite delivery, indefinite quantities contracts for public construction shall be limited to construction or non-routine/non-service maintenance projects costing Five Hundred Thousand Dollars (\$500,000.00) or less.

6. The following construction projects are prohibited under indefinite delivery, indefinite quantities contracts for public construction:

A. Any public construction or maintenance project costing more than \$500,000;

B. Building a new building in excess of 2,000 square feet or an addition in excess of 2,000 square feet;

C. New construction or reconstruction of a street, road, or highway in excess of 1,600 square yards of finish surface area.

7. The Department of Finance and Administration shall adopt regulations necessary to administer the provisions of this paragraph. All indefinite delivery, indefinite quantities contracts for public construction entered into by state agencies must be reviewed and approved by the Department of Finance and Administration, as required by law. The Department may establish in rules and regulation threshold amounts below which approval will not be required, but shall require agencies to maintain complete records documenting the processes they followed in entering into these contracts. Any such contract required by law to be approved by the Department of Finance and Administration that is not so approved shall be void. The institutions of higher learning may utilize indefinite delivery, indefinite quantities contracts but shall be subject to the oversight and approval of the Department of Finance and Administration when utilizing such contracts.

8. All contractors entering into agreements authorized by this sub-paragraph (iii) shall hold a current certificate of responsibility number in the appropriate classification as submitted by the Mississippi Board of Public Contractors in order to bid on any term contract for public construction, unless the term contract explicitly prohibits projects that exceed \$50,000.

(o) Purchase law violation prohibition and vendor penalty. No contract or purchase as herein authorized shall be made for the purpose of circumventing the provisions of this section requiring competitive bids, nor shall it be lawful for any person or concern to submit individual invoices for amounts within those authorized for a contract or purchase where the actual value of the contract or commodity purchased exceeds the authorized amount and the invoices therefor are split so as to appear to be authorized as purchases for which competitive bids are not required. Submission of such invoices shall constitute a misdemeanor punishable by a fine of not less than Five Hundred Dollars (\$500.00) nor more than One Thousand Dollars (\$1,000.00), or by imprisonment for thirty (30) days in the county jail, or both such fine and imprisonment. In addition, the claim or claims submitted shall be forfeited.

(p) Electrical utility petroleum-based equipment purchase procedure. When in response to a proper advertisement therefor, no bid firm as to price is submitted to an electric utility for power transformers, distribution transformers, power breakers, reclosers or other articles containing a petroleum product, the electric utility may accept the lowest and best bid therefor although the price is not firm.

(q) Fuel management system bidding procedure. Any governing authority or agency of the state shall, before contracting for the services and products of a fuel management or fuel access system, enter into negotiations with not fewer than two (2) sellers of fuel management or fuel access systems for competitive written bids to provide the services and products for the systems. In the event that the governing authority or agency cannot locate two (2) sellers of such systems or cannot obtain bids from two (2) sellers of such systems, it shall show proof that it made a diligent, good-faith effort to locate and negotiate with two (2) sellers of such systems. Such proof shall include, but not be limited to, publications of a request for proposals and letters soliciting negotiations and bids. For purposes of this paragraph (q), a fuel management or fuel access system is an automated system of acquiring fuel for vehicles as well as management reports detailing fuel use by vehicles and drivers, and the term "competitive written bid" shall have the meaning as defined in paragraph (b) of this section. Governing authorities and agencies shall be exempt from this process when contracting for the services and products of a fuel management or fuel access systems under the terms of a state contract established by the Office of Purchasing and Travel.

(r) Solid waste contract proposal procedure. Before entering into any contract for garbage collection or disposal, contract for solid waste collection or disposal or contract for sewage collection or disposal, which involves an expenditure of more than Fifty Thousand Dollars (\$50,000.00), a governing authority or agency shall issue publicly a request for proposals concerning the specifications for such services which shall be advertised for in the same manner as provided in this section for seeking bids for purchases which involve an expenditure of more than the amount provided in paragraph (c) of this section. Any request for proposals when issued shall contain terms and conditions relating to price, financial responsibility, technology, legal responsibilities and other relevant factors as are determined by the governing authority or agency to be appropriate for inclusion; all factors determined relevant by the governing authority or agency or required by this paragraph (r) shall be duly included in the advertisement to elicit proposals. After responses to the request for proposals have been duly received, the governing authority or agency shall select the most qualified proposal or proposals on the basis of price, technology and other relevant factors and from such proposals, but not limited to the terms thereof, negotiate and enter contracts with one or more of the persons or firms submitting proposals. If the governing authority or agency deems none of the proposals to be qualified or otherwise acceptable, the request for proposals process may be reinitiated. Notwithstanding any other provisions of this paragraph,

where a county with at least thirty-five thousand (35,000) nor more than forty thousand (40,000) population, according to the 1990 federal decennial census, owns or operates a solid waste landfill, the governing authorities of any other county or municipality may contract with the governing authorities of the county owning or operating the landfill, pursuant to a resolution duly adopted and spread upon the minutes of each governing authority involved, for garbage or solid waste collection or disposal services through contract negotiations.

(s) Minority set-aside authorization. Notwithstanding any provision of this section to the contrary, any agency or governing authority, by order placed on its minutes, may, in its discretion, set aside not more than twenty percent (20%) of its anticipated annual expenditures for the purchase of commodities from minority businesses; however, all such set-aside purchases shall comply with all purchasing regulations promulgated by the Department of Finance and Administration and shall be subject to bid requirements under this section. Set-aside purchases for which competitive bids are required shall be made from the lowest and best minority business bidder. For the purposes of this paragraph, the term "minority business" means a business which is owned by a majority of persons who are United States citizens or permanent resident aliens (as defined by the Immigration and Naturalization Service) of the United States, and who are Asian, Black, Hispanic or Native American, according to the following definitions:

(i) "Asian" means persons having origins in any of the original people of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands.

(ii) "Black" means persons having origins in any black racial group of Africa.

(iii) "Hispanic" means persons of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race.

(iv) "Native American" means persons having origins in any of the original people of North America, including American Indians, Eskimos and Aleuts.

(t) Construction punch list restriction. The architect, engineer or other representative designated by the agency or governing authority that is contracting for public construction or renovation may prepare and submit to the contractor only one (1) preliminary punch list of items that do not meet the contract requirements at the time of substantial completion and one (1) final list immediately before final completion and final payment.

(u) Procurement of construction services by state institutions of higher learning. Contracts for privately financed construction of auxiliary facilities on the campus of a state institution of higher learning may be awarded by the Board of Trustees of State Institutions of Higher Learning to the lowest and best bidder, where sealed bids are solicited, or to the offeror whose proposal is determined to represent the best value to the citizens of the State of Mississippi, where requests for proposals are solicited.

(v) Purchase authorization clarification. Nothing in this section shall be construed as authorizing any purchase not authorized by law.

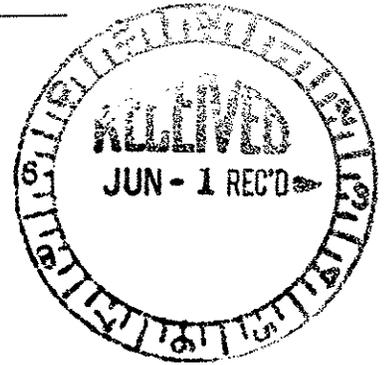
Sources: Codes, 1942, § 9024-08; Laws, 1962, ch. 497, § 8; Laws, 1980, ch. 440, § 6; Laws, 1981, ch. 306, § 2; Laws, 1982, ch. 449, § 1; Laws, 1983, ch. 330, § 3, ch. 341; Laws, 1984, ch. 363; Laws, 1984, ch. 480, § 3; Laws, 1984, ch. 488, § 158; Laws, 1985, ch. 493, § 6; Laws, 1986, ch. 398; Laws, 1986, ch. 489, § 14; Laws, 1988, ch. 351; Laws, 1988, ch. 589, § 23; Laws, 1988 Ex Sess, ch. 14, § 65; Laws, 1989, ch. 349, § 1; Laws, 1989, ch. 394, § 3; Laws, 1990, ch. 534, § 27; Laws, 1990, ch. 545, § 2; Laws, 1990, ch. 561, § 2;

~~Laws, 1990, 1st Ex Sess, ch. 51, § 2; Laws, 1991, ch. 337, § 1; Laws, 1991, ch. 523, § 1; Laws, 1992, ch. 571 § 3; Laws, 1993, ch. 418, § 2; Laws, 1993, ch. 617, § 12; Laws, 1993, ch. 556, § 3; Laws, 1994, ch. 471, § 2; Laws, 1994 Ex Sess, ch. 26, § 22; Laws, 1996, ch. 495, § 1; Laws, 1997, ch. 593, § 1; Laws, 1998, ch. 574, § 6; Laws, 1999, ch. 407, § 1; Laws, 1999, ch. 459, § 1; Laws, 2000, ch. 428, § 3; Laws, 2000, ch. 593, § 9; Laws, 2000, 3rd Ex Sess, ch. 1, § 13; Laws, 2001, ch. 333, § 2; Laws, 2002, ch. 563, § 1; Laws, 2003, ch. 539, § 5; Laws, 2004, ch. 394, § 1; Laws, 2004, ch. 577, § 2; Laws, 2004, 3rd Ex Sess, ch. 1, § 190; Laws, 2005, ch. 504, § 5; Laws, 2006, ch. 446, § 1; Laws, 2007, ch. 423, § 1; Laws, 2007, ch. 424, § 2; Laws, 2007, ch. 494, § 7; Laws, 2007, ch. 582, § 22; Laws, 2008, ch. 417, § 1; Laws, 2008, ch. 469, § 1; brought forward without change, Laws, 2008, ch. 544, § 4, eff from and after passage (approved May 9, 2008.)~~

Section 3. This act shall take effect and be in force from and after July 1, 2010.



Office of the President



May 29, 2009

Dr. Max K Arinder, Executive Director  
PEER Committee  
Woolfork Building, Suite 301-A  
501 North West Street  
Jackson, Mississippi 39201

Dear Dr. Arinder:

We have reviewed your draft report entitled *Mississippi State University's Acquisition of Selected Contracts FY 2006 to the Present*. Mississippi State University appreciates and commends your staff for its diligence and professionalism. We appreciate the opportunity to provide a response to your report.

Mississippi State University takes its fiduciary responsibility to the citizens of the State of Mississippi very seriously. We are pleased to note that the findings contained in the PEER report refer to issues that the university has previously identified and addressed. During 2008, the university examined construction practices questioned by local contractors, implemented corrective actions, and reported the results of the examination to IHL and the Office of the State Auditor, neither of whom found a cause for further action. As indicated in the PEER report, MSU's current construction acquisition practices are fully compliant.

The only recommendation directed toward Mississippi State--Number 4--urges MSU to educate university personnel and construction contractors regarding the requirements of policy and law.

In 2008, Mississippi State University implemented training sessions for Facilities Management and Procurement and Contracts personnel that emphasized the requirements of law, policies, and procedures. From September-November, 2008, MSU Procurement and Contracts staff members conducted specific training for 274 university employees, including those in Facilities Management and the Procurement and Contracts office. We will continue to hold periodic training sessions to inform Facilities Management and Procurement and Contracts personnel of changes in law, policies, and procedures. Construction contractors will be directed to information related to law, policies, and procedures on MSU's Web site.

Since assuming my role as university president in January, 2009, I have reaffirmed with our administrative team, as well as with our front-line personnel, our strong commitment to ensuring full compliance with the spirit and the letter of all policies and laws governing this institution. We appreciate your consideration of MSU's response.

Sincerely,

A handwritten signature in black ink that reads "Mark Keenum". The signature is written in a cursive style with a long horizontal line extending to the right.

Dr. Mark Keenum  
President

# MISSISSIPPI



## INSTITUTIONS OF HIGHER LEARNING

Office of Commissioner

May 29, 2009

Dr. Max K. Arinder, Executive Director  
Joint Committee on Performance  
Evaluation and Expenditure Review  
P. O. Box 1204  
Jackson, MS 39215-1204

Dear Dr. Arinder:

The Executive Office of the Mississippi Board of Trustees of State Institutions of Higher Learning has reviewed the PEER report draft entitled "Mississippi State University's Acquisition of Selected Construction Contracts, FY 2006 to Present." IHL appreciates the opportunity to read and respond to the draft report cited above and intends to take under consideration all the recommendations made by PEER regarding the acquisition of selected construction contracts. IHL offers the following response to express concerns regarding recommendation #2 made in the PEER report that amends MISS. CODE ANN. Section 31-7-13 (n).

**Recommendation #2: The Legislature should amend MISS. CODE ANN. Section 31-7-13 (n) (1972) to establish parameters for term contracts for public construction. The amendment should address the following:**

- *"Require the Department of Finance and Administration to approve all term contracts for public construction (i.e., in order to use term contracts, universities would be required to submit to DFA's oversight of term contracts);"*
- *"Impose a maximum cost limit of \$3 million per year on term contracts for public construction and a maximum cost per construction project of \$500,000;"*

**IHL Response:**

By recommending that MISS CODE ANN. Section 31-7-13 (n) be amended to require the Department of Finance and Administration (DFA) to approve **all** indefinite delivery, indefinite quantities term contracts for public construction, PEER is proposing a process that creates an additional level of bureaucracy that will ultimately slow down the construction process on IHL term contract construction projects rather than expedite it as

originally intended. The current oversight process is designed to expedite the construction process by allowing the individual institutions to oversee their own small scale projects under \$250,000, while requiring approval from the Institutional Executive Officer. Should an additional level of oversight need to be included for term contract public construction projects, then IHL proposes it be the authority of the IHL Board of Trustees to set the oversight level needed for all term contracts for public construction projects funded with self-generated funds. IHL does not believe DFA should set regulations or approve the term contracts for public construction projects funded with self-generated funds. The Mississippi Supreme Court in State of Mississippi, ex rel. Bill Allain v. Board of Trustees of Institutions of Higher Learning, 387 So.2d 89 (Miss. 1980), has clearly held that the constitutional authority/power is vested in the Board of Trustees of State Institutions of Higher Learning to use self-generated funds to construct facilities at the state universities without the approval of or control by the State Building Commission. The same logic would hold true that the Board of Trustees should be able to control and administer such building projects paid for with self-generated funds without any additional oversight or control by DFA. Any new statutory authority granted to DFA to administer or control any such state university building projects paid for with self-generated funds might be unconstitutional, in light of the Supreme Court's decision in Allain v. Board of Trustees.

The PEER report does not provide an explanation for how PEER derived the cost and time limit figures used in the recommendation made to amend MISS CODE ANN. Section 31-7-13 (n) (1972). Since this is a legislative recommendation to amend state law, IHL believes the Legislature as well as other readers of interest should be aware of the process PEER used to derive such numbers made in recommendation #2 before amending state law. IHL only knew the process PEER used by asking PEER staff how they derived the cost figures of \$3 million per year on term contracts for public construction and \$500,000 maximum per construction project.

Also, DFA was allowed to help set the cost and time limits cited above for university indefinite delivery, indefinite quantities term contracts without consulting any representative from the universities or the IHL Executive Office to obtain feedback as to what a fair and reasonable cost and time limit proposal for legislation may be for the university system. By consulting IHL as well as DFA and other Southern Regional Education Board (SREB) states, PEER could have better determined appropriate cost and time limits for term contracts for public construction for the university system as well as for other Mississippi state agencies. For example, there may have been a need to identify and distinguish time and dollar limits for the university system that differ from limits for other Mississippi state agencies, since IHL owns more land area than any other state agency and has approximately 50 percent of the state's building square footage.

Dr. Max Arinder  
May 29, 2009  
Page 3

Finally, IHL believes the exit conference conducted by PEER should have been conducted with representatives from the IHL Executive Office, Mississippi State University, and DFA together in one location at one time in order for each agency/institution to fully understand and discuss collectively any factual errors, corrections, concerns and/or questions that each agency/institution may have had. Instead, the exit conference was split into three separate exit conferences, which did not allow the IHL Executive Office, Mississippi State University and DFA to discuss joint concerns regarding the proposed legislation and its implications on each agency/institution.

Again, IHL appreciates the opportunity to review the report and respond. Thank you for your consideration of our concerns. Dr. Arinder, if you need additional information, please feel free to let us know.

Yours sincerely,

A handwritten signature in black ink that reads "Aubrey K. Lucas". The signature is written in a cursive style with a long, sweeping tail on the letter "s".

Aubrey K. Lucas  
Interim Commissioner of Higher Education



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## PEER's Comments on the Response of the Board of Trustees of State Institutions of Higher Learning (IHL)

In its response, IHL raises concerns that the legislation PEER proposes that would give the Department of Finance and Administration authority to approve term contracts (see the Appendix, page 33) might violate Section 213-A of the MISSISSIPPI CONSTITUTION by infringing on the IHL Board of Trustees' authority to manage and control use of self-generated revenues.

IHL cites the well-established precedent *State ex rel Allain v. Board of Trustees*, 387 So. 2d 89 (Miss, 1980). In *Allain*, the court ruled that the State Building Commission (predecessor of the Department of Finance and Administration's Bureau of Building) could not constitutionally enjoin the University of Southern Mississippi from constructing an expansion of the Gulf Coast Research Laboratory when such construction was to be funded through self-generated, non-appropriated funds. The court reasoned that Section 213-A, MISSISSIPPI CONSTITUTION OF 1890, vests the authority of management and control of the institutions to the Board of Trustees and that this control extends to the management of self-generated funds. In its response, IHL suggests that to give DFA authority over term contracting would be tantamount to giving DFA control of the use of IHL's self-generated funds.

While the *Allain* case confers upon IHL considerable authority over the use of self-generated funds utilized in university construction projects, PEER believes that the Committee's recommended amendment to state purchasing laws would not violate any constitutional prerogatives of the Board of Trustees, as explained below.

**The proposed statutory amendment is one of general applicability that would be followed by all state agencies, including IHL.**

In *Board of Trustees v. Mississippi Publishers Corporation*, 478 So. 2d 269 (Miss, 1985), the Mississippi Supreme Court ruled that IHL's activities are governed by provisions of the state's Open Meetings Act (MISS. CODE ANN. Section 25-41-1 et seq.) In so ruling, the court made clear that while the MISSISSIPPI CONSTITUTION grants broad authority to the Board of Trustees of State Institutions of Higher Learning to manage and control the institutions, the board is not beyond the general lawmaking authority

of the Legislature. The court concluded that the Open Meetings Act is such a general law to which IHL is subject.

Purchasing regulations are such a legal provision of general applicability in that they regulate the manner in which agencies may procure commodities and certain forms of services such as construction. In *Board of Trustees v. Peoples Bank* 538 So. 2d 361 (Miss, 1989), the Mississippi Supreme Court ruled that a contract between the University of Mississippi Dental School and a vendor was not enforceable. In so doing, the court concluded that purchasing by the Dental School was governed by provisions of general statute law, CODE Section 31-7-1 et seq., and the rules of the Commission on Budget and Accounting (a forerunner of the current DFA) and that the authority to supervise procurement was ultimately vested in the commission. Failure to purchase in accordance with rules authorized by law made the contract unenforceable.

The amendment PEER recommends is likewise a provision of general applicability. It would require that all state agencies that wish to use term contracts must follow certain steps in the process:

- compliance with DFA rules; and,
- pre-approval from the Department of Finance and Administration.

As the proposed legislation simply establishes certain requirements for making a particular type of procurement (i. e., term contracts) and that this would be extended to all state agencies, PEER believes that the proposed amendment is within the Legislature's authority to enact and would not infringe on IHL's authority to manage and control the universities.

**The amendment is related solely to a form of procurement and would not prohibit IHL from procuring a construction project without pre-approval, if it so desired.**

As may be inferred from this report, term contracts are a complicated form of procurement under which an entity contracts with an established source of supply for a specified service for a specified time and a pre-determined price. This is the type of contract the amendment would regulate by requiring both compliance with rules and pre-approval of agreements. In the event that an institution had a project that it wished to commence and did not choose to use a term contract, it could still legally commence and complete the project by the following:

- bid the project as provided for under CODE Section 31-7-13; or,

- for projects of less than \$50,000 in value, seek two quotes and proceed.

Neither type of contract would be subject to pre-approval from DFA.

In both of the latter cases, an institution would ultimately be able to procure the construction it desired without DFA's oversight of self-generated funds. PEER would also note that it would be within the Legislature's power to bar the use of term contracts by IHL or any other entity if it so chose. IHL would have no "right" under either the *Allain* case or the MISSISSIPPI CONSTITUTION to use a particular form of contracting if the Legislature deemed it not to be in the public's best interest.

In closing, the PEER Committee agrees that the constitutionally created Board of Trustees of State Institutions of Higher Learning has broad authority over self-generated funds, but that such does not entitle it to be exempt from general provisions of law intended to make public procurement more efficient.

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